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IN THE

Supreme Court of The United States

OCTOBER TERM, 1991

AVALA OF TEXAS, INC., d/b/a THE AVALA GROUP
AND d/b/a PLYMOUTH PARK SHOPPING CENTER

AND

INTERSHOP REAL ESTATE SERVICES, INC.,
f/k/a HFA MANAGEMENT USA CO.,

Petitioners

V.

THE HONORABLE DAVID WEST
JUDGE OF THE 269TH DISTRICT COURT
HARRIS COUNTY, TEXAS

AND

THE HONORABLE COURT OF APPEALS
FOR THE FIRST DISTRICT OF TEXAS,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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QUESTIONS PRESENTED

Forty-six states, as well as the federal court system, currently provide litigants with some appellate remedy for new trial orders that are erroneously granted. Texas, however, is one of only four jurisdictions where litigants are at the mercy of trial court judges who are free to grant new trials on the merest of whims without fear of appellate scrutiny. At the same time, Texas does offer mandamus review of new trial orders, but has arbitrarily restricted that review to new trial orders either absolutely void or based on a perceived conflict in jury answers.

The questions presented are:

1. Whether a state that provides no appellate review of orders granting new trials, but that offers mandamus review for new trial orders that are either void or based on a perceived conflict in jury answers, may arbitrarily deny mandamus review in all other instances to litigants whose right to have an erroneous new trial order set aside is no less "clear and indisputable"?

2. Whether a state may confer on each trial court a standardless and nonreviewable power to order new trials when such orders can deprive litigants of an errorless jury verdict, and burden them with a second trial, for any reason or no reason at all?

NOTE: Petitioners reserve the right to argue Question 3 in the event that certiorari is granted on the above questions, but do not include Question 3 among the reasons for the grant of certiorari.

3. Whether a trial court commits a "clear abuse of discretion" by usurping the jury's factfinding power in ordering a new trial,
   - when the record shows ample evidence to support the jury's verdict,
   - when the new trial is ordered against one party for whom no liability issues were even submitted to the jury,
   - when the jurors submit affidavits proving that no impropriety or misconduct occurred, and
   - when the new trial is ordered solely on the vague and standardless ground of "justice"?

PARTIES

Petitioners are Avala of Texas, Inc., d/b/a The Avala Group and d/b/a Plymouth Park Shopping Center ("Avala") and Intershop Real Estate Services, Inc., f/k/a HFA Management USA Co. ("Intershop"). Petitioners were the defendants in the underlying lawsuit and the relators in the original mandamus proceeding from which this petition for writ of certiorari arises.

Respondents are the Honorable David West, Judge of the 269th Judicial District Court of Harris County, Texas, and the Honorable Court of Appeals for the First District of Texas (the "First Court of Appeals"). Judge West and the First Court of Appeals were also the respondents in Petitioners' original mandamus proceeding in the Texas Supreme Court.

The real parties in interest are the plaintiffs in the underlying lawsuit: Gregorio Garcia, Alicia Nicole Garcia, Robert G. Wilson, and Theresa S. Wilson (the "Plaintiffs"). The underlying lawsuit is styled *Gregorio Garcia, Individually and as Surviving Husband of Patricia Wilson Garcia and as Next Friend of Alicia Nicole Garcia, and Robert G. Wilson and Theresa S. Wilson, Individually and as Surviving Parents of Patricia Wilson Garcia v. Avala of Texas, Inc., d/b/a the Avala Group and d/b/a Plymouth Park Shopping Center, and Intershop Real Estate Services, Inc., f/k/a Intershop HFA Management USA Co.*, No. 90-13234, in the 269th Judicial District Court of Harris County, Texas.

PARENT AND SUBSIDIARY COMPANIES OF PETITIONERS

Petitioner Avala's parent company is ADIV, Inc., a Delaware corporation. Avala has no subsidiaries.

Petitioner Intershop's parent company is Intershop Holding, Inc., a Delaware corporation. Intershop has three nonwholly owned subsidiaries: Intershop Real Estate Services, Inc. of Florida, Intershop Real Estate Services, Inc. of Georgia, and Intershop Real Estate Services, Inc. of Louisiana.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

Petitioners, Avala and Intershop, respectfully pray that a writ of certiorari issue to review the order of the Supreme Court of Texas, entered October 2, 1991, overruling Petitioners' motion for leave to file petition for writ of mandamus in the above-entitled proceeding, through which order the Supreme Court of Texas denied Petitioners review of the trial court's order granting a new trial on the sole ground that "justice" required a different result.

OPINIONS AND ORDERS BELOW

The Texas Supreme Court's order overruling Petitioners' motion for leave to file petition for writ of mandamus is reprinted as Appendix A hereto. The Texas Supreme Court's order denying Petitioners' motion for rehearing is reprinted as Appendix B hereto.

The opinion of the First Court of Appeals overruling Petitioners' motion for leave to file petition for writ of mandamus is reprinted as Appendix C hereto.

The trial court's order granting the motion for new trial is reprinted as Appendix D hereto. The trial court's order denying Petitioners' motion for reconsideration is reprinted as Appendix E hereto.

None of these orders or opinions have been officially reported.

JURISDICTION

After Plaintiffs' lawsuit resulted in a jury verdict absolving Petitioners of all liability, the trial court entered judgment on the verdict in Petitioners' favor. *See* Judgment, reprinted as Appendix F hereto. Thereafter, on July 26, 1991, the trial court granted Plaintiffs' motion for new trial. *See* App. D. The trial court denied Petitioners' motion for reconsideration on August 27, 1991. *See* App. E.

The First Court of Appeals, on September 16, 1991, issued an opinion overruling Petitioners' motion for leave to file petition for writ of mandamus. *See* App. C.

On October 2, 1991, the Texas Supreme Court overruled Petitioners' motion for leave to file petition for writ of mandamus. *See* App. A. The Texas Supreme Court denied Petitioners' motion for rehearing on October 23, 1991. *See* App. B.

The jurisdiction of this Court to review the judgment of the Texas Supreme Court is invoked under 28 U.S.C. § 1257(a) (1988).

STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS INVOLVED

TEX. R. CIV. P. 320. *Motion and Action of Court on New Trials*

> New trials may be granted and judgment set aside for good cause, on motion or on the court's own motion on such terms as the court shall direct. . . .

TEX. GOV'T CODE ANN. § 22.002(a) (West 1988). *Writ Power*

> The supreme court or a justice of the supreme court may issue writs of procedendo and certiorari and all writs of quo warranto and mandamus agreeable to the principles of law regulating those writs, against a district judge, a court of appeals or a justice of a court of appeals . . . .

U.S. CONST. amend. XIV, § 1.

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Patricia Wilson Garcia was stabbed to death while attempting to buy stamps at a self-service postal island in a shopping center parking lot. She was in her seventh month of pregnancy at the time. Her murderer was never caught. Mrs. Garcia's husband, daughter, and parents sued Petitioner Avala (the owner of the shopping center) and Petitioner Intershop (the manager of the shopping center) for

negligence claiming that inadequate security was responsible for her murder.

During the seven-day trial, Plaintiffs presented evidence attempting to blame the murder on deficient security at the shopping center. Petitioners challenged Plaintiffs' evidence and introduced their own evidence that the murder was unforeseeable, that Petitioners acted reasonably under the circumstances, and that no reasonable extra security measures would have prevented the attack. After the parties rested, Plaintiffs elected not to submit any jury issues concerning the liability of Petitioner Avala (the shopping center owner), but instead decided to proceed solely against Petitioner Intershop (the shopping center manager).

The jury returned a 10-2 verdict absolving Intershop of all liability by answering "No" to the following question:

> Did the negligence, if any, of Intershop Real Estate Services, Inc. proximately cause the occurrence in question?

See Jury Charge and Verdict, reprinted as Appendix G hereto, at G-4. After the verdict, Judge West called the jurors into his chambers and told them that he agreed with their verdict and that they had made the right decision. *See* Defendants' Motion for Reconsideration, reprinted as Appendix H hereto, at H-13, H-19, H-21, H-23, H-28, H-29.[1] Judge West then entered judgment on the verdict. *See* App. F.

Plaintiffs filed a two-page motion for new trial, contending solely that the jury's verdict was "against the greater weight and overwhelming preponderance of the evidence." *See* Plaintiffs' Motion for New Trial, reprinted as Appendix I hereto, at I-1. Without specifying any reason, Judge West

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[1] The cited pages are to individual juror affidavits attached to Defendants' Motion for Reconsideration.

entered an order granting Plaintiffs' motion for new trial. *See* App. D. Inexplicably, Judge West granted the new trial as to both Petitioners, even though Plaintiffs had waived their right to proceed against Petitioner Avala by failing to request any jury issues concerning Avala's liability. *See* App. H at H-2 to H-3.

Petitioners responded to the new trial order by filing a motion for reconsideration, attaching affidavits from the ten jurors who comprised the majority. *See id.* at H-6 to H-7, H-12 to H-29. These affidavits showed that the jury had heeded Judge West's admonition not to be swayed by sympathy or passion and that they had considered all the evidence, but that they did not believe that Plaintiffs proved their case. *See id.* Furthermore, these affidavits demonstrated that Judge West had abused his discretion by substituting his view of the evidence for the jury's view since the jury — the supreme arbiter of fact in our justice system — had decided the fact issue without any impropriety or misconduct. *See id.*

Petitioners' motion for reconsideration also first raised the federal question whether the trial court's new trial order deprived Petitioners of due process under the United States Constitution. Citing specifically to the Fourteenth Amendment and to several decisions of this Court, Petitioners argued that the new trial order violated Petitioners' federal due process rights since Petitioners, having won an errorless jury verdict, were not entitled under Texas law to mandamus or appellate review of the new trial order.[2] *See id.* at H-8 to H-9.

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[2] In Texas, a trial court's order granting a new trial is not subject to review either by direct appeal from that order, or from a final judgment rendered after further proceedings in the trial court. *Cummins v. Paisan Constr. Co.*, 682 S.W.2d 235, 236 (Tex. 1984); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014 (West Supp. 1991) (excluding new trial orders from

Judge West denied Petitioners' motion for reconsideration without addressing the federal due process issue. *See* App. E. Indeed, at the hearing on Petitioner's motion, Judge West refused to discuss why he ordered the new trial. *See* Transcript of Hearing on Motion for Reconsideration, relevant excerpts of which are reprinted as Appendix J hereto, at J-3. Without explanation, Judge West tossed out the verdict on the vague and standardless ground that "justice" required a new trial. *See id.*

Petitioners then initiated an original mandamus proceeding in the First Court of Appeals praying that a writ of mandamus issue directing Judge West either (1) to set aside the new trial order and render judgment on the jury's verdict, or (2) to issue a new trial order detailing how the verdict was against the great weight and preponderance of the evidence. *See* Petition for Writ of Mandamus, reprinted as Appendix K hereto, at K-25. By this petition for mandamus, Petitioners expressly sought to challenge the constitutionality of Texas law shielding new trial orders from any review whatsoever unless those orders are wholly void or based on a perceived conflict in jury answers.[3] *See id.* at K-3.

Petitioners' constitutional challenge again relied explicitly on the Fourteenth Amendment and on this Court's precedent. *See id.* at K-19, K-21. Petitioners raised federal questions of both due process and equal protection, arguing that "[t]he Texas judicial system provides some kind of review

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list of appealable interlocutory orders). An order granting a new trial is subject to mandamus review in two arbitrary instances not presented on this record: (1) when the trial court's order is absolutely void, and (2) when the trial court's order is based on a perceived conflict in jury answers. *See Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 918 (Tex. 1985) (original mandamus proceeding). The rule limiting mandamus review to these two exceptions represents an arbitrary and irrational anomaly of Texas jurisprudence. *See* discussion *infra* note 25.

[3] *See* authorities cited *supra* note 2.

for every type of trial court order, and the peculiar exemption of new trial orders from any review contravenes the due process and equal protection clauses of the United States and Texas Constitutions." *See id.* at K-19.

These federal questions were also raised by Plaintiffs' response to the petition for mandamus. One of the "QUESTIONS PRESENTED" by Plaintiffs was: "Whether the long-standing rule that trial court orders granting a new trial are not reviewable by writ of mandamus violates either the Texas or U.S. Constitution?" *See* Answer to Petition for Writ of Mandamus, reprinted as Appendix L hereto, at L-3; *see also id.* at L-5 to L-8 (relying almost exclusively on Supreme Court precedent in arguing the federal questions).

Without addressing the federal questions presented, the First Court of Appeals issued a per curiam opinion denying Petitioners leave to file the petition for writ of mandamus. *See* App. C; Motion for Leave to File Petition for Writ of Mandamus, reprinted as Appendix M hereto.[4]

Petitioners then initiated an original mandamus proceeding in the Texas Supreme Court, naming Judge West and the First Court of Appeals as respondents. *See* Petition for Writ of Mandamus, reprinted as Appendix N hereto. Petitioners implored the Texas Supreme Court, as the court of last resort in the state, to decide the question whether a new trial order can be reviewed through a mandamus proceeding when litigants have no right to appeal such an order. *See id.* at N-26. Petitioners prayed that a writ of mandamus issue (1) directing Judge West to set aside the new trial order and

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[4] The Texas Rules of Appellate Procedure require that a motion for leave to file accompany a petition for writ of mandamus. TEX. R. APP. P. 121(a)(1), 211(a). "If the court is of the tentative opinion that relator is entitled to the relief sought, the motion for leave to file will be granted, the petition filed, and the cause placed upon the docket. Otherwise, the motion will be overruled." TEX. R. APP. P. 121(c).

to render judgment on the jury's verdict; or (2) directing Judge West to issue a new trial order detailing how the verdict was against the great weight and preponderance of the evidence; or (3) directing the First Court of Appeals to grant leave to file the petition for mandamus and to determine whether Judge West abused his discretion. *See id.* at N-1 to N-2 & n.1, N-27.

By this petition for mandamus, Petitioners renewed their constitutional challenge to the Texas rule shielding new trial orders from review. *See id.* at N-4. Once again, Petitioners relied on the Fourteenth Amendment and on this Court's precedent in posing their federal constitutional challenge on due process and equal protection grounds. *See id.* at N-20, N-22. Once again, these federal questions were briefed and argued by Plaintiffs in responding to the petition for mandamus. *See* Answer to Petition for Writ of Mandamus, reprinted as Appendix O hereto, at O-3, O-6 to O-8.

The Texas Supreme Court rejected Petitioners' federal due process and equal protection challenges, issuing an order denying Petitioners leave to file the petition for mandamus. *See* App. A; Motion for Leave to File Petition for Writ of Mandamus, reprinted as Appendix P hereto.[5]

Still convinced that the new trial order should be reviewed, Petitioners filed a motion for rehearing on the petition for mandamus. *See* Relators' Motion for Rehearing, reprinted as Appendix Q hereto. Petitioners reiterated their constitutional challenge to the Texas rule shielding new trial orders from review. *See id.* at Q-3. On October 23, 1991, the Texas Supreme Court issued an order overruling Petitioners' motion for rehearing, ending Petitioners' quest for state relief on the federal questions presented. *See* App. B.

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[5] *See also supra* note 4 (explaining Texas procedure governing motions for leave to file petitions for mandamus).

Beginning December 9, 1991, Petitioners will be forced to endure the hardship of a second trial at great expense and for no reason other than the trial judge's vague and standardless notion of "justice." Notwithstanding that further proceedings remain on Plaintiffs' underlying lawsuit, Petitioners invoke this Court's jurisdiction over the Texas Supreme Court's order denying leave to file the petition for mandamus since that order rejected Petitioners' federal due process and equal protection challenges.[6]

There are three reasons why this Court's jurisdiction is appropriate. First, the merits of Petitioners' constitutional challenges, which were presented and terminated in an original mandamus proceeding, are wholly separate from and independent of the merits of Plaintiffs' lawsuit.[7] *See Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 558 (1963); *Local No. 438, Constr. & Gen. Laborers' Union v. Curry*, 371 U.S. 542, 548-49 (1963). Second, should Petitioners' prevail upon retrial of the underlying lawsuit, the federal questions will be mooted; should Petitioners lose upon retrial, state law[8] precludes appellate review of the new trial order. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 478-79, 481

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[6] Although the Texas Supreme Court's order did not "in direct terms" reject Petitioners' federal constitutional challenge, the "necessary effect" of the order was to reject that challenge. *See New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928).

[7] Because original proceedings are inherently independent and collateral actions, this Court has consistently reviewed state court rulings denying mandamus. *See, e.g., Smith v. Hooey*, 393 U.S. 374, 375-76 (1969) (reviewing "an informal and unreported order of the Texas Supreme Court" refusing mandamus); *Pacific Coast Dairy, Inc. v. Department of Agric.*, 318 U.S. 285, 290-91 (1943) (reviewing dismissal of a writ of alternative mandamus); *Board of Educ. v. Superior Court*, 448 U.S. 1343, 1346 (Rehnquist, Circuit Justice 1980) (observing that denial of a petition for mandamus was final, reviewable order).

[8] *See* authorities cited *supra* note 2.

(1975). Finally, this Court's instant determination on the merits of Petitioners' constitutional challenge could preclude further litigation over Plaintiffs' lawsuit. *See id.* at 482-83.

REASONS FOR GRANTING THE WRIT

I. The Texas Supreme Court's Denial of Mandamus Review for New Trial Orders when Litigants Have No Appellate Remedy Conflicts in Principle with (a) this Court's *Daiflon* Decision and (b) Forty-Six Other State Jurisdictions.

As this Court recognized in *Allied Chemical Corp. v. Daiflon, Inc.*, an order granting a new trial is interlocutory in nature and therefore not immediately appealable. 449 U.S. 33, 34 (1980). Nevertheless, twenty-seven states now provide litigants an immediate right to appeal new trial orders,[9] and another sixteen permit discretionary appeals of such orders,[10] to relieve "aggrieved parties of the necessity of retrying cases in which valid judgments are obtained and erroneously set aside by trial courts."[11] Twelve other states,[12] as well as the federal court system,[13] allow litigants to appeal new trial orders after retrial, even though that method of review still does not eliminate the "hardship and waste resulting from the requirement that the parties proceed with a new trial merely to establish a final judgment."[14] In all,

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[9] *See* tables subdividing the methods of reviewing new trial orders by state, reprinted as Appendix R hereto.

[10] *See id.*

[11] Isadore Rabinowitz, *Appellate Review of Trial Court Orders Granting New Trials*, 8 RUTGERS L. REV. 465, 468 (1953).

[12] *See* App. R.

[13] *See Daiflon*, 449 U.S. at 34 (construing 28 U.S.C. § 2106).

[14] Rabinowitz, *supra* note 11, at 467.

forty-six states[15] and the federal courts provide litigants with some appellate remedy for new trial orders that are erroneously granted. Not Texas.

Texas is one of only four jurisdictions[16] where litigants are at the mercy of trial court judges who are free to grant new trials on the merest of whims without fear of appellate scrutiny.[17] The present case illustrates the plight that all such litigants face: Following an expensive and onerous seven-day trial, the jury's verdict is discarded, not because of insufficient evidence (which was the sole ground that Plaintiffs asserted in their motion for new trial),[18] not because of any erroneous evidentiary rulings,[19] but because the jury's answer did not accord with the trial judge's notion of "justice."[20] Even though no jury issues were even submitted on one Petitioner's liability, both Petitioners must now endure a second trial, and fund the litigation all over again, merely because the trial judge disagreed with the jury's verdict. Such caprice, hardship, and waste inflicted on litigants by the unavailability of appellate review could be alleviated, however, by allowing mandamus review of new trial orders as Petitioners have sought.[21]

In *Daiflon*, this Court addressed the issue whether mandamus is appropriate to review new trial orders when the

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[15] Some of these forty-six states provide more than one method of reviewing new trial orders. *See* App. R.

[16] Maryland, Virginia, and New Mexico are the other three. *See id.*

[17] *See* authorities cited *supra* note 2.

[18] *See* App. I at I-1.

[19] *See, e.g., Daiflon,* 449 U.S. at 33.

[20] *See* App. J at J-3.

[21] Mandamus review could materially advance the termination of the litigation, would not be overly burdensome to either party, and would be far less expensive than the cost of a new trial.

"litigant is free to seek review of the propriety of such an order on direct appeal after a final judgment." 449 U.S. at 36. That is not the issue presented here: Petitioners, and all similarly-situated Texas litigants, have "no other adequate means to attain the relief" they desire. *Id.* at 35. Thus, while mandamus might not be appropriate to review an *appealable* new trial order as in *Daiflon, id.* at 35-36, mandamus review should be available to correct an erroneous new trial order when the litigant has no adequate remedy by appeal. *Cf. Mallard v. United States Dist. Court,* 490 U.S. 296, 309 (1989) ("To ensure that mandamus remains an extraordinary remedy, petitioners must show that they lack adequate alternative means to obtain the relief they seek . . . .").

Although, according to this Court, mandamus review should be available to correct any "clear abuse of discretion"[22] or "judicial usurpation of power,"[23] the Texas Supreme Court has arbitrarily and irrationally restricted its mandamus review of new trial orders to those that are either absolutely void or based on a perceived conflict in jury answers.[24] This restriction is arbitrary and irrational because it represents an anomaly of Texas jurisprudence,[25] having no

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[22] *Mallard,* 490 U.S. at 309.

[23] *Daiflon,* 449 U.S. at 35.

[24] *See* authorities cited *supra* note 2.

[25] As early as 1872, Texas courts allowed mandamus to be used to set aside orders granting new trials. *See Lloyd v. Brinck*, 35 Tex. 1, 10 (1872) (original mandamus proceeding). The peculiar rule exempting new trial orders from review appears to have its origin in the 1911 decision of *Wright v. Swayne*, 140 S.W. 221 (Tex. 1911) (original mandamus proceeding). Without mentioning *Brinck*, the *Wright* court held that mandamus would not issue unless the new trial order was "absolutely void." *Id.* at 222. Then, in 1926, the Texas Supreme Court decided *Gulf, C. & S.F. Ry. v. Canty*, in which the court issued mandamus overturning a new trial order that was based on the trial court's

basis in the principles of law regulating writs of mandamus.[26]

In Texas, as well as in this Court,[27] mandamus is appropriate when "the trial court's order is so arbitrary, unreasonable, or based upon so gross and prejudicial an error of law as to establish abuse of discretion."[28] Because of the Texas Supreme Court's arbitrary restriction on mandamus review, however, a trial court that orders a new trial may commit the most egregious abuse of discretion, such as overturning a jury verdict merely because the trial court does not like the result reached by the jury, yet the new trial order would still not be reviewable unless it came within the two exceptions.[29]

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erroneous conclusion that the jury's findings were irreconcilable. 285 S.W. 296, 299 (Tex. 1926) (original mandamus proceeding). Although the *Canty* court relied on *Brinck* for its decision, and although no Texas court has ever overruled or modified *Brinck*, one thing is clear: later courts seized on *Wright* and *Canty* as authority for the proposition that a new trial order can be set aside on mandamus *only if* the order (1) is absolutely void, or (2) is based on a perceived conflict in jury answers. *See, e.g., Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 918 (Tex. 1985) (original mandamus proceeding). Borne by a misunderstanding of precedent, the rule has become entrenched in Texas jurisprudence even though there is not — and never has been — any reason for its existence. For a fuller discussion of this anomaly, see App. K, at K-16 to K-18, and App. N, at N-17 to N-19.

[26] *See* TEX. GOV'T CODE ANN. § 22.002(a) (West 1988) (authorizing Texas Supreme Court to issue all writs of mandamus "agreeable to the principles of law regulating those writs").

[27] *See* cases cited *supra* notes 22-23.

[28] *Johnson*, 700 S.W.2d at 918; *see also* Act of Feb. 21, 1927, 40th Leg., R.S., ch. 52, § 2, 1927 Tex. Gen. Laws 75-76 (recognizing that "the granting of new trials is largely discretionary with the trial court and not subject to reversal *except for abuse of discretion*") (emphasis added).

[29] *See Johnson*, 700 S.W.2d at 918. *Johnson* is internally inconsistent since it recognizes that mandamus should issue when a trial judge clearly abuses his discretion, yet it blindly adheres to

The practical effect of this restriction, which might be reasonable in states providing appellate remedies for such abuses of discretion, is unreasonably harsh on Texas litigants precisely because there is no appellate remedy for the granting of new trial orders.

The question presented is this: If a state provides mandamus review for new trial orders that are either absolutely void or based on a perceived conflict in jury answers, why should mandamus review be arbitrarily and summarily denied to litigants whose right to have an erroneous new trial order set aside is no less "clear and indisputable" and who have no right to appellate review? *See Daiflon*, 449 U.S. at 36. That is to say, if a trial court's ordering of a new trial will justify mandamus review in two instances, why should mandamus not issue in other instances in which litigants can demonstrate a "clear abuse of discretion" or "a judicial usurpation of power"? *See id.* at 35; *Mallard*, 490 U.S. at 309.

As these questions suggest, the present case gives this Court an opportunity to revisit the issue posed in *Daiflon* — whether a litigant may obtain review of a new trial order by mandamus — but under vastly different facts that may require a different answer:

- Unlike in *Daiflon*, 449 U.S. at 33, the trial court here did not base the new trial order on erroneous evidentiary rulings or on insufficient evidence, but on the vague and standardless ground of "justice." *See* App. J at J-3.
- Unlike in *Daiflon*, 449 U.S. at 34 & n.1, Petitioners' application for mandamus provided the reviewing court with a complete transcript of the trial showing

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the rule restricting mandamus review of new trial orders without undertaking any meaningful abuse of discretion analysis. *Compare id.* at 917-18 (abuse of discretion analysis) *with id.* at 918 (restrictive rule).

that there was ample evidence supporting the jury's verdict and that Petitioners were entitled to have the new trial order set aside. *See* App. N at N-4 & n.2; App. K at K-4 & n.1.

- Unlike in *Daiflon*, 449 U.S. at 36, Petitioners have no way of ever obtaining review of the new trial order if not by mandamus review.

Because the Texas Supreme Court's order denying mandamus ignored these distinctions, and because these distinctions raise important and unresolved problems of due process and equal protection (discussed below), this Court's plenary consideration is essential.

II. By Precluding Any Review of New Trial Orders that Constitute Clear Abuses of Discretion, the Texas Supreme Court's Decision Raises Important and Unresolved Problems of Due Process and Equal Protection.[30]

A. Due Process

1. *By Arbitrarily Shielding New Trial Orders From the Most Minimal Judicial Scrutiny, Texas Confers on Trial Courts a Standardless Power to Order New Trials.*

The Due Process Clause of the Fourteenth Amendment "imposes on the States the standards necessary to ensure that judicial proceedings are fundamentally fair." *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 33 (1981). Due process further requires that, when a state has created appellate remedies, it must "offer each defendant a fair opportunity to obtain an adjudication on the merits of his appeal."

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[30] It is well established that corporations, like Petitioners, are "persons" within the meaning of the Fourteenth Amendment. *See Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 881 n.9 (1985).

Evitts v. Lucey, 469 U.S. 387, 405 (1985).[31] In Texas, the only standards guaranteeing the fairness and reviewability of new trial orders are (1) that such orders be issued while the trial court has plenary power, and (2) that if the orders are based on a perceived conflict in jury answers, the answers must truly be irreconcilable.[32] A Texas trial court may order a new trial on any other basis — no matter how arbitrary, irrational, or unfounded — and yet be secure in the knowledge that its decision cannot be reviewed either on appeal or by mandamus.

The fact that forty-six states and the federal court system provide some method of reviewing new trial orders is not conclusive as to whether Texas's lack of review accords with due process, "'but it is plainly worth considering in determining whether the practice "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."'" *Schall v. Martin*, 467 U.S. 253, 268 (1984) (quoting *Leland v. Oregon*, 343 U.S. 790, 798 (1952) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934))).[33] As the present case illustrates, Texas's lack of review makes a mockery of the jury system by effectively allowing trial courts to toss out errorless jury verdicts for any reason or no reason at all. A litigant who has spent thousands of dollars on one trial and has fairly won a jury verdict should not have to endure a second trial, and fund the litigation all over again, based on the whim of a trial judge without at least an opportunity for review.

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[31] *See also Texaco Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1154 (2d Cir. 1986) (same), *rev'd on other grounds*, 481 U.S. 1 (1987).

[32] *See Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 918 (Tex. 1985) (original mandamus proceeding).

[33] *See also McKeiver v. Pennsylvania*, 403 U.S. 528, 548 (1971) (noting that practice followed in 29 states and the District of Columbia was "of more than passing interest").

By shielding from even the most minimal judicial scrutiny new trial orders that constitute clear abuses of discretion, the Texas Supreme Court has conferred on trial courts a standardless power to order new trials. The vesting of such a power in a single man or woman, without any opportunity for review, is repugnant to due process and "fair adjudicative procedure" since it fails to "guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 243, 242 (1980). Here, a trial judge's individual conception of "justice" was sufficient to nullify a seven-day trial and an errorless jury verdict.

Incredibly, although there are at least as many notions of "justice" as there are trial judges, the Texas Supreme Court has explicitly upheld "justice" as a nonreviewable ground for ordering new trials.[34] Hence, a trial judge merely has to invoke the magic word "justice" in ordering a new trial and, as in this case, the new trial order will not be reviewed. Predictably, one prominent Texas litigation guide now counsels practitioners to include the word "justice" in the new trial order to avoid mandamus review.[35]

Such a "vague and standardless" ground on which to order new trials, however, "leaves judges . . . free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." *See Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03 (1966). It leaves judges free to substitute their judgment for that of the jury, free to substitute their individual notions of "justice" for the jury's

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[34] *Johnson*, 700 S.W.2d at 918; *Champion Int'l Corp. v. Twelfth Court of Appeals*, 762 S.W.2d 898, 899 (Tex. 1989) (original mandamus proceeding) (per curiam).

[35] MICHOL O'CONNOR, O'CONNOR'S TEXAS RULES: CIVIL TRIAL 606 (1991).

"public conception of justice."[36] Indeed, the jury system means nothing at all if a trial court can toss out a verdict with which it disagrees in the hope that the next jury will return a verdict more to its liking. At worst, such a vague and standardless power gives the trial court *carte blanche* to order new trials for any arbitrary and irrational reason that it can pass off as "justice."

Hence, this Court's guidance is needed to determine whether the Due Process Clause permits a trial court to be invested with such a standardless and almost godlike power over litigants, and whether Texas's interest in fashioning its own rules in this area is outweighed by (1) "the powerful and independent constitutional interest in fair adjudicative procedure," *Marshall*, 446 U.S. at 243, and (2) the federal "interest in protecting the individual citizen from state action that is wholly arbitrary or irrational," *Martinez v. California*, 444 U.S. 277, 282 (1980).

B. Equal Protection

1. *Having Created a Mandamus Remedy for New Trial Orders that Are Void or Based on a Perceived Conflict in Jury Answers, Texas Cannot Arbitrarily Deny Mandamus Review to Other Litigants Aggrieved by Equally Erroneous New Trial Orders.*

Texas, like other states, is not constitutionally obligated to create appellate remedies for trial court orders and decisions. *Lindsey v. Normet*, 405 U.S. 56, 77 (1972). "When an appeal is afforded, however, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause." *Id.*[37]

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[36] JOHN RAWLS, A THEORY OF JUSTICE 5 (1971).

[37] *See also Lynk v. LaPorte Superior Court No. 2*, 789 F.2d 554, 565 (7th Cir. 1986) (Posner, J.) ("The state may not be constitutionally obligated to create appellate remedies but having

Although all Texas litigants aggrieved by new trial orders are denied the right to appeal,[38] the Texas Supreme Court has capriciously and arbitrarily divided these litigants for purposes of mandamus review.

The Texas Supreme Court divides new trial orders — and thus, necessarily, litigants — into "two discrete groups that are accorded radically disparate treatment." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 438 (1982) (Blackmun, J., concurring). New trial orders that are granted after the trial court's plenary power has expired, or that are based on a perceived conflict in jury answers, are reviewed on mandamus by an appellate court for abuse of discretion.[39] In contrast, new trial orders not falling within these two exceptions, no matter how egregious the abuse of discretion, and no matter how extreme the judicial usurpation of power, are not even granted leave for the mandamus petition to be filed.[40]

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done so it may not arbitrarily deny them to a particular class of litigants.")

[38] *Cummins v. Paisan Constr. Co.*, 682 S.W.2d 235, 236 (Tex. 1984); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014 (West Supp. 1991) (excluding new trial orders from list of appealable interlocutory orders).

[39] *See Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 918 (Tex. 1985) (original mandamus proceeding).

[40] The unavailability of mandamus review for new trial orders not falling within the two exceptions is unfair and unequal not only compared with the reviewability of new trial orders falling within the two exceptions, but also compared with the expanding availability of mandamus review for other kinds of trial court orders in Texas. *See, e.g., Henderson v. O'Neill*, 797 S.W.2d 905, 905 (Tex. 1990) (original mandamus proceeding) (issuing mandamus to vacate an order granting a change of venue even though interlocutory venue orders are appealable after trial); *Masinga v. Whittington*, 792 S.W.2d 940, 940-41 (Tex. 1990) (original mandamus proceeding) (conditionally granting mandamus to vacate an order preventing the videotaping of a deposition); *Garcia v. Peeples*,

Because "the function of legal process is to minimize the risk of erroneous decisions," *Addington v. Texas*, 441 U.S. 418, 425 (1979), it must seriously be doubted whether the Texas Supreme Court's arbitrary and capricious classification of new trial orders rationally advances the legitimate governmental objective of minimizing legal error. *See Logan*, 455 U.S. at 439 (Blackmun, J., concurring). Under the Texas scheme, even new trial orders constituting clear abuses of discretion may routinely be denied review because the reviewing court's analysis does not focus on abuse of discretion or judicial usurpation of power, but on whether the new trial order fits neatly into one of two arbitrarily predetermined review categories. Thus, litigants aggrieved by new trial orders not falling into one of these categories may be forced to retry cases even though valid judgments were obtained but erroneously set aside by trial courts.

Petitioners, on behalf of all such litigants, seek this Court's determination whether such an arbitrarily restrictive method of reviewing new trial orders passes muster under the Equal Protection Clause.

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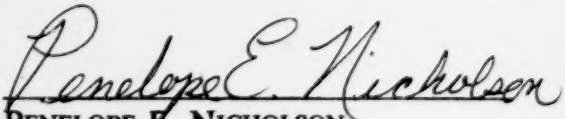
734 S.W.2d 343, 347-48 (Tex. 1987) (original mandamus proceeding) (conditionally granting mandamus to vacate pretrial discovery order limiting the use of discovery documents). In light of the widespread availability of mandamus relief, mandamus should also be available to vacate erroneous new trial orders. An order granting a new trial is the most onerous of all trial court orders; with mandamus available to resolve squabbles over whether particular documents are discoverable or whether a particular deposition should be videotaped, it is absurd for mandamus not to be available to determine whether a party who has fairly prevailed in one trial should have to face the expense and burden of a second trial.

CONCLUSION

For all the foregoing reasons, this petition for certiorari should be granted. Petitioners reiterate that Question 3 is presented herein, not as a reason for granting certiorari, but because this is the only opportunity for Petitioners, given the current posture of this case and the law, to obtain review of the trial court's order granting a new trial. If Petitioners are correct in urging that the Texas Supreme Court's order denying mandamus review violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment, then this Court should so hold and should grant the relief that the Texas Supreme Court should have granted including directing that the trial court's new trial order be set aside. Alternatively, this Court should remand this matter to the Texas Supreme Court for appropriate disposition including a full determination whether the trial court abused its discretion in granting a new trial and whether mandamus should issue. Finally, this Court should grant Petitioners all appropriate relief to which they may be entitled.

Respectfully submitted,



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November 25, 1991

91-830

Supreme Court, U.S.
FILED
NOV 25 1991
OFFICE OF THE CLERK

NO.

IN THE

Supreme Court of The United States

OCTOBER TERM, 1991

AVALA OF TEXAS, INC., d/b/a THE AVALA GROUP
AND d/b/a PLYMOUTH PARK SHOPPING CENTER

AND

INTERSHOP REAL ESTATE SERVICES, INC.,
f/k/a HFA MANAGEMENT USA CO.,

Petitioners

V.

THE HONORABLE DAVID WEST
JUDGE OF THE 269TH DISTRICT COURT
HARRIS COUNTY, TEXAS

AND

THE HONORABLE COURT OF APPEALS
FOR THE FIRST DISTRICT OF TEXAS,

Respondents

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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APPENDIX A

THE SUPREME COURT OF TEXAS

NO. D-1540

AVALA OF TEXAS, INC. d/b/a THE AVALA GROUP
and d/b/a PLYMOUTH PARK SHOPPING CENTER ET AL.

v.

THE HONORABLE DAVID WEST, JUDGE, ET AL.

Original Mandamus Proceeding

October 2, 1991

Dear Counsel:

Today, the Supreme Court of Texas overruled relator's motion for leave to file petition for writ of mandamus in the above styled case. Relator/s motion to transfer exhibits from the trial court is overruled.

Respectfully yours,

JOHN T. ADAMS, Clerk

/s/ PEGGY LITTLEFIELD

Peggy Littlefield,
Chief Deputy Clerk

cc: Ms. Kathryn Cox, Clerk
Hon. William (David) West, Judge

APPENDIX B

THE SUPREME COURT OF TEXAS

NO. D-1540

AVALA OF TEXAS, INC. d/b/a THE AVALA GROUP
and d/b/a PLYMOUTH PARK SHOPPING CENTER ET AL.

v.

THE HONORABLE DAVID WEST, JUDGE, ET AL.

October 23, 1991

Dear Counsel:

Today, the Supreme Court of Texas overruled relator's motion for rehearing of motion for leave to file petition for writ of mandamus in the above referenced case.

Sincerely,

JOHN T. ADAMS, Clerk

/s/ COURTLAND CROCKER

Courtland Crocker, Deputy

cc: Ms. Kathryn Cox, Clerk
Hon. William (David) West, Judge

APPENDIX C

IN THE COURT OF APPEALS
for the
FIRST DISTRICT OF TEXAS

NO. 01-91-00808-CV

AVALA OF TEXAS, INC., d/b/a THE AVALA GROUP and d/b/a PLYMOUTH PARK SHOPPING CENTER AND INTERSHOP REAL ESTATE SERVICES, INC., f/k/a HFA MANAGEMENT USA CO.,

Relators

V.

THE HONORABLE DAVID WEST, JUDGE OF THE 269TH DISTRICT COURT OF HARRIS COUNTY, TEXAS,

Respondent

Original Proceeding on Motion for
Leave to File Petition for Writ of Mandamus

OPINION

Relators ask this Court to direct the respondent to set aside his order granting a new trial.

We overrule relators' motion for leave to file a petition for writ of mandamus.

PER CURIAM

Panel consists of Justices Duggan, Mirabal and Wilson.

Do not publish. TEX. R. APP. P. 90.

Judgment rendered and opinion delivered September 16, 1991.

True Copy Attest:

/s/ KATHRYN COX

Kathryn Cox
Clerk of Court

APPENDIX D

IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS
269TH JUDICIAL DISTRICT

NO. 90-13234

GREGORIO GARCIA, ET AL.

VS.

AVALA OF TEXAS, INC., ET AL.

ORDER GRANTING MOTION FOR NEW TRIAL

BE IT REMEMBERED that on this 26th day of July, 1991, came on to be heard Plaintiffs' Motion for New Trial. The Court is of the opinion that said Motion should in all things be granted.

SIGNED this 26th day of July, 1991.

/s/ DAVID WEST
Judge Presiding

APPENDIX E

IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS
269TH JUDICIAL DISTRICT

NO. 90-13234

GREGORIO GARCIA, INDIVIDUALLY AND AS SURVIVING HUSBAND OF PATRICIA WILSON GARCIA, AND AS NEXT FRIEND OF ALICIA NICOLE GARCIA, AND ROBERT G. WILSON AND TERESA S. WILSON, INDIVIDUALLY AND AS SURVIVING PARENTS OF PATRICIA WILSON GARCIA

VS.

AVALA OF TEXAS, INC. d/b/a THE AVALA GROUP and d/b/a PLYMOUTH PARK SHOPPING CENTER, AND INTERSHOP REAL ESTATE SERVICES, f/k/a HFA MANAGEMENT USA CO.

ORDER

On the 26th day of August, 1991, came on to be heard Defendants' Motion for Reconsideration.

It is ORDERED, ADJUDGED and DECREED that Defendants' Motion for Reconsideration is DENIED.

Signed and entered this 27th day of August, 1991.

/s/ DAVID WEST
Judge Presiding

APPENDIX F

IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS
269TH JUDICIAL DISTRICT

NO. 90-13234

GREGORIO GARCIA, INDIVIDUALLY AND AS SURVIVING HUSBAND OF PATRICIA WILSON GARCIA, AND AS NEXT FRIEND OF ALICIA NICOLE GARCIA, and ROBERT G. WILSON AND TERESA S. WILSON, INDIVIDUALLY AND AS SURVIVING PARENTS OF PATRICIA WILSON GARCIA

VS.

AVALA OF TEXAS, INC. d/b/a THE AVALA GROUP and d/b/a PLYMOUTH PARK SHOPPING CENTER, AND INTERSHOP REAL ESTATE SERVICES, f/k/a HFA MANAGEMENT USA CO.

JUDGMENT

On the 3rd day of June, 1991 CAME ON TO BE HEARD the above-entitled and numbered cause of action and Plaintiffs, GREGORIO GARCIA, INDIVIDUALLY AND AS SURVIVING HUSBAND OF PATRICIA WILSON GARCIA, AND AS NEXT FRIEND OF ALICIA NICOLE GARCIA, and ROBERT G. WILSON AND TERESA S. WILSON, INDIVIDUALLY AND AS SURVIVING PARENTS OF PATRICIA WILSON GARCIA, (hereinafter "Plaintiffs") appeared in person and by attorney of record and announced ready for trial. Defendants, AVALA OF TEXAS, INC. d/b/a THE AVALA GROUP and d/b/a PLYMOUTH PARK SHOPPING CENTER, AND INTERSHOP REAL ESTATE SERVICES f/k/a HFA MANAGEMENT USA COMPANY, (hereinafter "Defendants") appeared in person by attorney of record, and a jury having been demanded, all matters of fact and controversy were submitted to a jury consisting of twelve good and lawful

jurors was duly empaneled and the case proceeded to trial. At the conclusion of the evidence the Court submitted the case to the jury on special issues. The charge of the Court included as Question No. One:

Did the negligence, if any, of Intershop Real Estate Services, Inc. proximately cause the occurrence in question?

Answer "Yes" or "No": _____

All other questions in the charge were contingent upon a "yes" answer to Question No. 1. The charge of the Court, including the special issues and the verdict of the jury are incorporated herein for all purposes by reference.

It appearing to the Court that the verdict of the jury was for the Defendants and against the Plaintiffs in that the jury, in answering Question No. 1 answered "no", judgment should be rendered upon the verdict in favor the Defendants and against the Plaintiffs. It is therefore,

ORDERED, ADJUDGED AND DECREED BY THE COURT that Plaintiffs take nothing by this suit and that Defendants be in all things, discharged and go hence without day. All costs of court are taxed against the Plaintiffs for which, let execution issue. All other relief not expressly granted herein is denied.

SIGNED THIS 5th day of July, 1991.

/s/ DAVID WEST
Judge Presiding

APPENDIX G

IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS
269TH JUDICIAL DISTRICT

NO. 90-13234

GREGORIO GARCIA, ET AL.

VS.

AVALA OF TEXAS, INC., ET AL.

LADIES AND GENTLEMEN OF THE JURY:

This case is submitted to you by asking questions about the facts, which you must decide from the evidence you have heard in this trial. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony, but in matters of law you must be governed by the instructions in this charge. In discharging your responsibility on this jury, you will observe all the instructions which have been previously given you. I shall now give you additional instructions which you should carefully and strictly follow during your deliberations.

1. Do not let bias, prejudice or sympathy play any part in your deliberations.

2. In arriving at your answers consider only the evidence introduced here under oath and such exhibits, if any, as have been introduced for your consideration under the rulings of the court, that is, what you have seen and heard in this courtroom, together with the law as given you by the court. In your deliberations you will not consider or discuss anything that is not represented by the evidence in this case.

3. Since every answer that is required by the charge is important, no juror should state or consider that any required answer is not important.

4. You must not decide who you think should win, and then try to answer the questions accordingly. Simply answer the questions, and do not discuss or concern yourselves with the effect of your answers.

5. You will not decide the answer to a question by lot or by drawing straws, or by any other method of chance. Do not return a quotient verdict. A quotient verdict means that the jurors agree to abide by the result to be reached by adding together each juror's figures and dividing by the number of jurors to get an average. Do not do any trading on your answers; that is, one juror should not agree to answer a certain question one way if others will agree to answer another question another way.

6. You may render your verdict upon the vote of ten or more members of the jury. The same ten or more of you must agree upon all of the answers made and to the entire verdict. You will not, therefore, enter into an agreement to be bound by a majority of any other vote of less than 10 jurors. If the verdict and all the answers therein are reached by unanimous agreement, the Presiding Juror shall sign the verdict for the entire jury. If any juror disagrees as to any answer made by the verdict, those jurors who agree to all findings shall each sign the verdict.

These instructions are given you because your conduct is subject to review the same as that of the witnesses, parties, attorneys and the judge. If it should be found that you have disregarded any of these instructions, it will be jury misconduct and it may require another trial by another jury; then all of our time will have been wasted.

The presiding juror or any other who observes a violation of the court's instructions shall immediately warn the one who is violating the same and caution the juror not to do so again.

When words are used in this charge in a sense which varies from the meaning commonly understood, you are given a proper legal definition, which you are bound to accept in place of any other definition or any other meaning.

Answer "Yes" or "No" to all questions unless otherwise instructed. A "Yes" answer must be based on a preponderance of the evidence. If you do not find that a preponderance of the evidence supports a "Yes" answer, then answer "No."

The term "preponderance of the evidence" means the greater weight and degree of credible testimony or evidence introduced before you and admitted in this case.

Whenever a question requires other than a "Yes" or "No" answer, your answer must be based on a preponderance of the evidence.

Question No. 1

Did the negligence, if any, of Intershop Real Estate Services, Inc. proximately cause the occurrence in question?

"Negligence" means the failure to use ordinary care; that is, failure to do that which a person of ordinary prudence would have done under the same or similar circumstances or doing that which a person of ordinary prudence would not have done under the same or similar circumstances.

"Ordinary care" means that degree of care that would be used by a person of ordinary prudence under the same or similar circumstances.

"Proximate cause" means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.

Answer "Yes" or "No": NO

If, in answer to Question No. 1, you have found that the negligence of Intershop Real Estate Services, Inc. was the cause of the occurrence, then answer Questions 2-7. Otherwise, do not answer Questions 2-7.

Question No. 2

What sum of money, if paid now in cash, would fairly and reasonably compensate Greg Garcia for his damages, if any, resulting from the death of Patricia Garcia?

Consider the elements of damages listed below and none other. Consider each element separately. Do not include damages for one element in any other element. Do not include interest on any amount of damages you find.

Answer, with respect to the elements listed below, in dollars and cents for damages, if any:

a. Pecuniary loss sustained in the past: $_____

Pecuniary loss that in reasonable probability will be sustained in the future: $_____

b. Loss of companionship and society in the past: $_____

Loss of companionship and society that in reasonable probability will be sustained in the future: $_____

c. Mental anguish in the past: $_____

Mental anguish that in reasonable probability will be sustained in the future: $_____

"Pecuniary loss" means the loss of the care, maintenance, support, services, advice, counsel, and reasonable contributions of a pecuniary value that Greg Garcia, in reasonably probability, would have received from Patricia Garcia had she lived.

"Loss of companionship and society" means the loss of the positive benefits flowing from the love, comfort,

companionship, and society that Greg Garcia, in reasonable probability, would have received from Patricia Garcia had she lived.

"Mental anguish" means the emotional pain, torment, and suffering experienced by by Greg Garcia because of the death of Patricia Garcia.

In determining damages for the elements "b" and "c," you may consider the relationship between Greg Garcia and Patricia Garcia, their living arrangements, any extended absences from one another, the harmony of their family relations, and their common interests and activities. You are reminded that elements "b" and "c," like the other elements of damages, are separate, and, in awarding damages for one element, you shall not include damages for the other.

Question No. 3

What sum of money, if paid now in cash, would fairly and reasonably compensate Alicia Nicole Garcia for her damages, if any, resulting from the death of Patricia Garcia?

Consider the elements of damages listed below and none other. Consider each element separately. Do not include damages for one element in any other element. Do not include interest on any amount of damages you find.

Answer, with respect to the elements listed below, in dollars and cents for damages, if any:

a. Pecuniary loss sustained in the past: $_____

Pecuniary loss that in reasonable probability will be sustained in the future: $_____

b. Loss of companionship and society in the past: $_____

Loss of companionship and society that in reasonable probability will be sustained in the future: $_____

c. Mental anguish in the past: $_____

Mental anguish that in reasonable probability will be sustained in the future: $_____

"Pecuniary loss" means the loss of the care, maintenance, support, services, advice, counsel, and reasonable contributions of a pecuniary value that Alicia Nicole Garcia, in reasonably probability, would have received from Patricia Garcia had she lived.

"Loss of companionship and society" means the loss of the positive benefits flowing from the love, comfort, companionship, and society that Alicia Nicole Garcia, in reasonable probability, would have received from Patricia Garcia had she lived.

"Mental anguish" means the emotional pain, torment, and suffering experienced by by Alicia Nicole Garcia because of the death of Patricia Garcia.

In determining damages for the elements "b" and "c," you may consider the relationship between Alicia Nicole Garcia and Patricia Garcia, their living arrangements, any extended absences from one another, the harmony of their family relations, and their common interests and activities. You are reminded that elements "b" and "c," like the other elements of damages, are separate, and, in awarding damages for one element, you shall not include damages for the other.

Question No. 4

What sum of money, if paid now in cash, would fairly and reasonably compensate Robert G. Wilson for his damages, if any, resulting from the death of Patricia Garcia?

Consider the elements of damages listed below and none other. Consider each element separately. Do not include damages for one element in any other element. Do not include interest on any amount of damages you find.

Answer, with respect to the elements listed below, in dollars and cents for damages, if any:

a. Pecuniary loss sustained in the past: $_____

Pecuniary loss that in reasonable probability will be sustained in the future: $_____

b. Loss of companionship and society in the past: $_____

Loss of companionship and society that in reasonable probability will be sustained in the future: $_____

c. Mental anguish in the past: $_____

Mental anguish that in reasonable probability will be sustained in the future: $_____

"Pecuniary loss" means the loss of the care, maintenance, support, services, advice, counsel, and reasonable contributions of a pecuniary value that Robert G. Wilson, in reasonably probability, would have received from Patricia Garcia had she lived.

"Loss of companionship and society" means the loss of the positive benefits flowing from the love, comfort, companionship, and society that Robert G. Wilson, in reasonable probability, would have received from Patricia Garcia had she lived.

"Mental anguish" means the emotional pain, torment, and suffering experienced by by Robert G. Wilson because of the death of Patricia Garcia.

In determining damages for the elements "b" and "c," you may consider the relationship between Robert G. Wilson and Patricia Garcia, their living arrangements, any extended absences from one another, the harmony of their family relations, and their common interests and activities. You are reminded that elements "b" and "c," like the other elements of damages, are separate, and, in awarding damages for one element, you shall not include damages for the other.

Question No. 5

What sum of money, if paid now in cash, would fairly and reasonably compensate Theresa S. Wilson for her damages, if any, resulting from the death of Patricia Garcia?

Consider the elements of damages listed below and none other. Consider each element separately. Do not include damages for one element in any other element. Do not include interest on any amount of damages you find.

Answer, with respect to the elements listed below, in dollars and cents for damages, if any:

a. Pecuniary loss sustained in the past: $_____

Pecuniary loss that in reasonable probability will be sustained in the future: $_____

b. Loss of companionship and society in the past: $_____

Loss of companionship and society that in reasonable probability will be sustained in the future: $_____

c. Mental anguish in the past: $_____

Mental anguish that in reasonable probability will be sustained in the future: $_____

"Pecuniary loss" means the loss of the care, maintenance, support, services, advice, counsel, and reasonable contributions of a pecuniary value that Theresa S. Wilson, in reasonably probability, would have received from Patricia Garcia had she lived.

"Loss of companionship and society" means the loss of the positive benefits flowing from the love, comfort, companionship, and society that Theresa S. Wilson, in reasonable probability, would have received from Patricia Garcia had she lived.

"Mental anguish" means the emotional pain, torment, and suffering experienced by by Theresa S. Wilson because of the death of Patricia Garcia.

In determining damages for the elements "b" and "c," you may consider the relationship between Theresa S. Wilson and Patricia Garcia, their living arrangements, any extended absences from one another, the harmony of their family relations, and their common interests and activities. You are reminded that elements "b" and "c," like the other elements of damages, are separate, and, in awarding damages for one element, you shall not include damages for the other.

Question No. 6

What sum of money would have fairly and reasonably compensated Patricia Garcia for:

Pain and mental anguish

"Pain and mental anguish" means the conscious physical pain and emotional pain, torment, and suffering experienced by Patricia Garcia before her death as a result of the occurrence in question.

Answer in dollars and cents for damages, if any.

Answer: _____

Question No. 7

Was such negligence of Intershop Real Estate Services, Inc. "gross negligence?"

"Gross negligence" means more than momentary thoughtlessness, inadvertence, or error of judgment. It means such an entire want of care as to establish that the act or omission in question was the result of actual conscious indifference to the rights, welfare, or safety of the persons affected by it.

Answer "Yes" or "No": _____

If you have answered Question No. 7 "Yes," then answer the following question. Otherwise, do not answer the following question.

Question No. 8

What sum of money should be assessed against Intershop Real Estate Services, Inc. as exemplary damages, if any, for the death of Patricia Garcia?

"Exemplary damages" means an amount that you may in your discretion award as an example to others and as a penalty or by way of punishment, in addition to any amount that you may have found as actual damages.

Answer in dollars and cents for damages, if any.

Answer: _____

If, in your answer to Question No. 8, you have entered any amount of exemplary damages, then answer Question No. 9. Otherwise, do not answer Question No. 9.

Question No. 9

How do you apportion the exemplary damages between Greg Garcia and Alicia Nicole Garcia?

Answer by stating a percentage for each person named below. The percentages you find must total 100%.

a.	Greg Garcia	_____%
b.	Alicia Nicole Garcia	_____%
	Total	100%

After you retire to the jury room, you will select your own presiding juror. The first thing the presiding juror will do is to have this complete charge read aloud and then you will deliberate upon your answers to the questions asked.

It is the duty of the presiding juror:

1. to preside during your deliberations,

2. to see that your deliberations are conducted in an orderly manner and in accordance with the instructions in this charge,

3. to write out and hand to the bailiff any communications concerning the case that you desire to have delivered to the judge,

4. to vote on the questions,

5. to write your answers to the questions in the spaces provided, and

6. to certify to your verdict in the space provided for the presiding juror's signature or to obtain the signatures of all the jurors who agree with the verdict if your verdict is less than unanimous.

You should not discuss the case with anyone, not even with other members of the jury, unless all of you are present and assembled in the jury room. Should anyone attempt to talk to you about the case before the verdict is returned, whether at the courthouse, at your home, or elsewhere, please inform the judge of this fact.

When you have answered all the questions you are required to answer under the instructions of the judge, and your presiding juror has placed your answers in the spaces provided and signed the verdict as presiding juror or obtained the signatures, you will inform the bailiff at the

door of the jury room that you have reached a verdict, and then you will return into court with your verdict.

/s/ DAVID WEST
Judge Presiding

June 11, 1991

CERTIFICATE

We, the jury, have answered the above and foregoing questions as herein indicated, and herewith return same into court as our verdict.

(To be signed by the presiding juror if unanimous.)

_____

Presiding Juror

(To be signed by those rendering the verdict if not unanimous.)

/s/ TOM CLAYTON	/s/ JAMES M. WILSON
/s/ PAUL C. GOODWIN	/s/ JOE W. DAVIDSON
/s/ ELIZABETH C. GRAHAM	/s/ JEFFREY M. WALLIS
/s/ MARC C. LANDLAND	/s/ CORNELIUS WILLIAMS
/s/ RACHEL POWELL	
/s/ HOWARD R. MILLER	

APPENDIX H

IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS
269TH JUDICIAL DISTRICT

NO. 90-13234

GREGORIO GARCIA, ET AL.

VS.

AVALA OF TEXAS, INC., ET AL.

DEFENDANTS' MOTION FOR RECONSIDERATION

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW, Avala of Texas, Inc. d/b/a The Avala Group and d/b/a Plymouth Park Shopping Center (hereafter "Avala"), and Intershop Real Estate Services, Inc., f/k/a HFA Management USA Co. (hereafter "Intershop"), Defendants in the above-entitled and numbered cause of action, and file this Motion for Reconsideration of this Court's order granting Plaintiffs' Motion for New Trial. Defendants would show the Court the following:

I. This Case Was Fairly Tried by Both Sides, The Jury Considered All the Evidence, and The Jury's Verdict Should Stand

As the Court is aware, this case was tried to a jury for approximately seven days, beginning on June 4, 1991. The jury, after considering all the evidence before it, rendered a verdict finding no liability against Defendant Intershop Real Estate Services, Inc. f/k/a HFA Management USA, Co. Plaintiffs elected not to submit any liability issues as to Defendant Avala of Texas, Inc. d/b/a The Avala Group and d/b/a Plymouth Park Shopping Center. A take-nothing judgment was entered for both Defendants on July 5, 1991.

The Court heard Plaintiffs' motion for new trial and entered an order granting the same on July 26, 1991.

II. This Court Has Authority to Ungrant Its New Trial Order During the 75-Days of Its Plenary Jurisdiction

This Court has broad discretion to withdraw prior orders while plenary jurisdiction exists. This plenary power is the full and complete power to reverse, modify, or vacate its prior orders. Tex. R. Civ. P. 329b(c) gives this Court 75 days to determine a motion for new trial, before the motion is overruled by operation of law. During this period, the Court can take any action on the motion for new trial, including changing its mind and vacating a prior order granting a new trial. *See Fulton v. Finch*, 346 S.W.2d 823, 827 (Tex. 1961); *Garza v. Gonzalez*, 737 S.W.2d 588 (Tex. App. — San Antonio 1987, orig. proceeding); *Essex Int'l v. Wood*, 646 S.W.2d 322, 324-25 (Tex. App. — Dallas 1983, no writ). Because the judgment was signed on July 5, 1991, this Court's plenary jurisdiction continues until September 18, 1991, the 75th day after the judgment.

III. Defendant Avala Was Properly Entitled to a Take-Nothing Judgment Because Plaintiffs Submitted No Issues as to Its Fault

At trial, Plaintiffs elected not to submit any issues of fault for Avala, and submitted a negligence question only as to Intershop. *See* Court's Charge. According to Tex. R. Civ. P. 279, an independent ground of recovery which is not submitted or requested is waived. The take-nothing judgment of July 5, 1991, is proper as to Avala; therefore, the Court erred in granting a new trial as to the entire cause of action. Tex. R. Civ. P. 320 provides that a new trial may be granted as to parts that are "clearly separable." The question of Avala's alleged negligence, clearly separable from Intershop's negligence, was not submitted, and is therefore waived. The

judgment is final as to Avala. Plaintiffs' motion addressed only the sufficiency of the evidence with regard to Intershop's negligence and did not challenge the finality of the judgment as to Avala. Therefore, the granting of a new trial as to both parties is in error.

IV. The Trial Court (Like the Appellate Courts) Cannot Substitute Its Own Finding for the Jury's Verdict

This Court cannot disregard the jury verdict and substitute its own liability finding for the jury's liability finding. By doing so, the Court violates the sanctity of the constitutionally mandated right of trial by jury. *See, e.g., Texas Farmers Ins. Co. v. McGuire*, 744 S.W.2d 601, 063 (Tex. 1988); *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 633-35 (Tex. 1986). In *Larsen v. Cactus Utility Co.*, 730 S.W.2d 640, 641 (Tex. 1987), the Texas Supreme Court emphasized that "no court is free to substitute its judgment for that of the jury," and that any practice that "effectively allows jurists' determinations to be substituted for those of the jury" should be condemned. The Supreme Court declared that *"trial courts and courts of appeals should be subject to the same standard for a simple reason: no court is free to substitute its judgment for that of the jury." Id.* at 641 (emphasis added). *See also Hopson v. Gulf Oil Corp.*, 150 Tex. 1, 237 S.W.2d 352, 358 (1951) (power of court of appeals to reverse for insufficiency "is the same as that exercised by the trial court when it sets aside the jury's verdict on account of insufficient evidence and awards a new trial").

The Court of Appeals' right of review of a jury's factual finding is constitutionally limited. TEX. CONST. ART. § 6; *see Cropper v. Caterpillar Tractor Co.*, 754 S.W.2d 646, 648 (Tex. 1989); *Herbert v. Herbert*, 754 S.W.2d 141, 143-44 (Tex. 1988). Trial courts, thus, are not entitled to any greater powers than courts of appeals. By granting Plaintiffs a new trial presumably based on this Court's conclusion that the

jury must have decided the case on something other than the evidence, this Court is substituting its own liability finding for the jury's liability finding. In *Herbert*, 754 S.W.2d at 144, the supreme court recognized the "sanctity to which a jury verdict is entitled" and observed that "courts are not free to substitute their judgment for that of the jury simply because they may disagree with the jury's verdict."

The only basis for a new trial presented in Plaintiffs' motion is sufficiency of the evidence. This Court's order of July 5, 1991 merely recites that the motion is granted. In reviewing a sufficiency challenge, all the evidence must be considered and weighed, and the verdict should only be set aside if the evidence is so weak or the finding is so against the great weight and preponderance of the evidence that it is clearly wrong and unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986); *Garza v. Alviar*, 395 S.W.2d 821, 823 (Tex. 1965). The reviewing court may not disregard a finding or make a contrary finding in entering judgment for one of the parties. *Garza*, 395 S.W.2d at 823. Because the trier of fact is the sole judge of the credibility of witnesses and the weight to be given their testimony, the *reviewing court may not substitute its opinion* for that of the trier of fact merely because it might have reached a different fact conclusion. *Herbert*, 754 S.W.2d at 144. Recent law suggests that trial courts, like the appellate courts, should be prohibited from vacating a jury's verdict based upon the evidence unless a correct standard of review is applied and the evidence, in fact, will not support the jury's verdict. *Larsen*, 730 S.W.2d at 641; *Pool*, 715 S.W.2d at 633-35.

V. In Reviewing the Sufficiency of the Evidence The Trial Court Is Required to Detail the Evidence and Explain How the Evidence Supports the Contrary Conclusion

When granting a new trial on factual sufficiency grounds, a reviewing court must detail the evidence relevant to the

issue and clearly state why the jury's finding is factually insufficient or is so against the great weight and preponderance as to be manifestly unjust, why it shocks the conscience, or why it clearly demonstrates bias. *Cropper*, 754 S.W.2d at 652; *Pool*, 715 S.W.2d at 635. The reviewing court must undertake "analyses of the evidence" or state "bases for the conclusion drawn." *Pool*, 715 S.W.2d at 635. The trial court or the appellate court must have a cognizable "mental process by which it reaches its conclusion concerning sufficiency." *Id.* Further, the reviewing court is required to state the contrary evidence which greatly outweighs the evidence in support of the verdict. *Cropper*, 754 S.W.2d at 652; *Pool*, 715 S.W.2d at 635. In reviewing great weight points, the supreme court has admonished a reviewing court to be mindful that the preponderance of the evidence did not convince the jury. *Herbert*, 754 S.W.2d at 144. A new trial is only warranted where the great weight of the evidence supports an affirmative answer. *Id.*

The trial court can have no greater right to review on factual sufficiency grounds than the appellate courts, *Larsen*, 730 S.W.2d at 641, and supreme court precedents make it clear that a detailed review of the evidence is required when a court is unfinding facts. Thus, this Court is constitutionally required to enter findings detailing the evidence both in support of and against the liability finding, explaining how the liability finding by the jury is against the great weight and preponderance of the evidence.[1] The restrictions on the

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[1] Evidentiary hearings and fact findings by the trial court are required in other cases where constitutional issues are involved. For example, the trial court is required to file findings of fact and conclusions of law in *Batson* cases when peremptory challenges are used to exclude jurors on account of race. *See Batson v. Kentucky*, 106 S. Ct. 1712 (1986) (criminal case); *Keeton v. State*, 724 S.W.2d 58 (Tex. Crim. App. 1987) (Texas criminal case); *Edmonson v. Leesville Concrete Co., Inc.*, 111 S. Ct. 2077 (1991) (applying *Batson* rule to civil cases); *Powers*

trial court's right to overturn the jury's verdict can be no more than those of the appellate court which are constitutionally mandated. This is exactly what *Larsen* holds. If the Court does not enter written findings detailing the evidence, the appellate courts cannot determine whether this Court applied the proper standard of review. Attached as Exhibit K is the statement of facts from the trial to assist the Court in entering its findings.

VI. The Jurors' Affidavits Support the Conclusion that This Case Was Fairly Tried and All the Evidence Considered

Attached as Exhibits A through J, and incorporated herein by reference as if set forth verbatim, are ten affidavits from the foreman and members of the jury who adjudicated fault in this case. These affidavits establish that the jury followed their oath and considered only the evidence and the judge's instructions. Further, these affidavits recount the jurors' discussions with the Court, following receipt of the verdict, in which the jurors indicated that the verdict was reached in favor of the Defendants because the Plaintiffs failed to prove their case. These affidavits can be received because they neither seek to impeach the verdict on the basis of jury misconduct nor to inquire into the validity of the verdict. *See* TEX. R. CIV. P. 327; TEX. R. CIV. EVID. 606(b). *See also Shaw v. Greater Houston Transp. Co.*, 791 S.W.2d 204, 211 (Tex. App. — Corpus Christi 1990, no writ) (holding that five juror affidavits were admissible because "relevant" and "helpful" on issue other than to impeach the jury verdict). The only grounds in Plaintiffs' motion for a new trial are insufficient evidence to support the verdict. These affidavits merely demonstrate the jury considered all of the evidence

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v. Palacios, 34 Tex. Sup. Ct. J. 651 (June 12, 1991) (per curiam) (Texas civil case). The new bonding rules also contemplate hearings and findings by the court. *See* TEX. R. APP. P. 49(b).

before it. The affidavits do not seek to impeach the verdict; rather the affidavits seek to permit the jury's verdict to stand and are relevant in showing the juror's true intent. As such, this Court's receipt of the juror affidavits "contravenes no announced principle of public policy." *Caylat v. Houston E.Y.W.T. Ry.*, 252 S.W. 478, 482 (Tex. Comm'n App. 1923, op. adopted).

Similarly, Defendants' chart of the lay-out of the shopping center, upon which the jury marked the location of each of the 40 crimes that had occurred around the shopping center, is also relevant in that it clearly shows that the jury carefully considered the evidence in reaching its verdict. *See* Exhibit L. The chart is objective proof that the jury had before it evidence showing that each of the 40 crimes, a list of which Plaintiffs introduced into evidence, occurred in an area of the shopping center far removed from the area upon which the decedent was murdered. Hence, the chart is likewise relevant and admissible on the very issue upon which this Court granted Plaintiffs' motion for a new trial, i.e. the factual sufficiency of the evidence to support the jury's no liability finding in favor of Defendant.

VII. Plaintiffs' Motion for New Trial Was Insufficient

Plaintiffs' motion does not specify the particular way the evidence is sufficient. Therefore, the trial court acted upon an improper motion.

VIII. Defendants' Constitutional Rights to a Jury Trial, Due Process of Law, Double Jeopardy, and Appellate Review Will Be Violated if this Court's Order Granting New Trial Is Not Set Aside

A. Defendants Are Entitled Under the Texas Constitution to the Right to Trial by Jury. TEX. CONST. ART. I § 15.

A party has a protected interest in the jury's verdict on the merits. *Carter v. Carter*, 5 Tex. 93, 100-01 (1849). Indeed, as one recent Texas court stressed, the "jury's verdict, in Texas courts, has a special, significant sacredness and inviolability. The jury's verdict cannot be violated under our Texas Constitution." *Crawford v. Standard Fire Ins. Co.*, 779 S.W.2d 935, 941 (Tex. App. — Beaumont 1989, no writ) (citing TEX. CONST. ART. I § 15 (1984)). This is the reason the supreme court placed limitations on the trial court's inherent power and an appellate court's constitutional power to vacate a jury's verdict. *See Choate v. San Antonio & AP Ry.*, 91 Tex. 406, 44 S.W. 69 (1898). These reasons were restated in the *Pool* and *Larsen* supreme court opinions. (*See* section IV, *infra.)*

B. Defendants Are Entitled to Due Process of Law Under the Texas and U.S. Constitutions.

A fundamental component of the due process guarantees embodied in both the United States and Texas Constitution is that a party be allowed to have the merits of the case "fairly judged." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982). This principle dictates that judicial decisions be rendered in accordance with "reasonably clear guidelines." *Smith v. Goguen*, 415 U.S. 566, 572-73 (1974). TEX. CONST. ART. I § 19; UNITED STATES CONST. AMEND. V, XIV.

C. Defendants Will Be Denied Their Right to Appellate Review of the Order Granting New Trial.

Failure to afford a litigant appellate review, either immediate or from a subsequent judgment, of an order from a past verdict granting a new trial, offends due process. The Texas Constitution guarantees litigants the right to obtain review of a trial court's decisions by an appellate court. TEX. CONST. ART. I §§ 13, 19. "A dissatisfied litigant ... has the constitutional right to have his case reviewed by the Court of Civil Appeals." *Stroud v. Word,* 36 S.W.2d 590, 591 (Tex. Civ. App. — Waco 1931, no writ). Litigants are also denied their right to due process of law under the Fourteenth Amendment of the United States Constitution. Due process requires each State must "offer each defendant a fair opportunity to obtain an adjudication of the merits of his appeal." *Evitts v. Lucey,* 469 U.S. 387, 405 (1985). Presently, Defendants are not entitled as a matter of right to mandamus relief, or to appellate review of the current ruling, except possibly on an abuse of discretion. Plaintiffs, on the other hand, have a remedy if the jury verdict stands. Plaintiffs can test the sufficiency of the evidence in the Court of Appeals.

D. Defendants Will Be Subject to Double Jeopardy.

This Court's order granting a new trial violates the double jeopardy clause because it subjects Defendants to multiple or successive punitive damage awards for the same course of conduct when a jury has already absolved Defendants of any liability. TEX. CONST. ART. I § 14, United States Const. Amend. V. Punitive damages are not awarded to compensate plaintiff, but rather to punish the wrongdoer and deter similar conduct by others. *Lunsford v. Morris,* 746 S.W.2d 471 (Tex. 1988) (citing *Graham v. Roder,* 5 Tex. 141, 149 (1849)). Because punitive damages are penal in nature,

Defendants will be subject to double jeopardy by an arbitrary re-trial of an error-free trial, in violation of both the Texas and United States Constitution.

WHEREFORE, PREMISES CONSIDERED, Defendants pray that this Court grant this Motion for Reconsideration and withdraw the prior order granting a new trial; or alternatively, amend its order of new trial to reflect a new trial as to only Defendant Intershop Real Estate Services, Inc., f/k/a HFA Management USA Co., and for such other and further relief to which Defendants may show themselves to be justly entitled.

Respectfully submitted,

VINSON & ELKINS

By /s/ LOUIS E. MCCARTER

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Attorneys for Defendants, AVALA OF TEXAS, INC. d/b/a PLYMOUTH PARK SHOPPING CENTER, and INTERSHOP REAL ESTATE SERVICES, INC., f/k/a HFA Management USA Co.

CERTIFICATE OF CONFERENCE WITH OPPOSING COUNSEL

Counsel for Defendants have conferred with counsel for the Plaintiffs and the attorney ad litem and have in good faith attempted to resolve the matter. Counsel for Defendants has been informed that those parties oppose the foregoing motion.

/s/ LOUIS E. MCCARTER
Louis E. McCarter

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served upon counsel of record, listed below, on this the 13th day of August, 1991, by hand-delivery and/or certified mail, return receipt requested.

Ronald D. Krist
Krist, Gunn, Weller, Neumann
17555 El Camino Real
Houston, Texas 77058

Mr. Jimmy G. Williamson
300 Fannin, Suite 300
Houston, Texas 77002

/s/ LOUIS E. MCCARTER
Louis E. McCarter

EXHIBIT A
To Defendants' Motion for Reconsideration

AFFIDAVIT OF THOMAS CHARLES CLAYTON

STATE OF TEXAS §
§
COUNTY OF HARRIS §

CAME BEFORE ME, the undersigned Notary Public, a person known to me to be THOMAS CHARLES CLAYTON, and stated that he is over the age of 18 years, that he has not been convicted of any crimes and is of sound mind. The affiant further stated that:

1. My name is THOMAS CHARLES CLAYTON. I was a juror in the case of *Gregorio Garcia, et al. vs. Avala of Texas, Inc., et al.;* Cause No. 90-13234, which was tried in the 269th Judicial District Court of Harris County, Texas, from June 3, 1991 through June 12, 1991. After the closing arguments, the judge gave us his charge and we retired to the jury room. I was elected foreman. We began by taking a vote on the first question. That question was:

> Did the negligence, if any, of Intershop Real Estate Services, Inc., proximately cause the occurrence in question?

The jurors voted 8-4 to answer this question "no". I voted last. We then discussed the evidence and the judge's instructions. Both groups of jurors explained their points of view and discussed the evidence seen and heard. Finally, a vote was taken and the jurors voted 10-2 to answer the first question "no".

In reaching this decision, there were no threats made of any kind. Nothing was discussed other than the evidence and the charge. No one appeared to be considering anything other than the evidence.

It was my opinion, based upon the evidence, that the murder of Mrs. Garcia was not foreseeable by the defendants and that it could not have been prevented. I did not feel that more security was needed based on the knowledge possessed by the shopping center. I also did not feel that the lack of security guards was a proximate cause of the crime. This seemed to also be the consensus of the other jurors.

I was not influenced by any passion, prejudice or bias and did not consider any such prejudice, passion or bias in reaching my verdict. No one else in the majority appeared to be influenced by anything other than the evidence. The two dissenting jurors were, in my opinion, swayed by the sympathy in the case.

After the verdict, Judge West spoke to us in his chambers for 40 minutes. He told us he believed we had made the right decision. Our decision was based on the evidence alone, and we did not feel the plaintiffs proved their case.

2. All of the foregoing is true and correct and within my personal knowledge.

Further the affiant sayeth not.

/s/ THOMAS CHARLES CLAYTON
Thomas Charles Clayton

Sworn to and subscribed before me this the 30th day of July, 1991.

/s/ DANITA JO HOEPPNER
Notary Public
My commission expires: 10-24-92

EXHIBIT B
To Defendants' Motion for Reconsideration
AFFIDAVIT OF ELIZABETH WALLS GRAHAM

STATE OF TEXAS §
§
COUNTY OF HARRIS §

CAME BEFORE ME, the undersigned Notary Public, a person known to me to be ELIZABETH WALLS GRAHAM, and stated that she is over the age of 18 years, that she has not been convicted of any crimes and is of sound mind. The affiant further stated that:

1. My name is ELIZABETH WALLS GRAHAM. I was a juror in the case of *Gregorio Garcia, et al. vs. Avala of Texas, Inc., et al.*; Cause No. 90-13234, which was tried in the 269th Judicial District Court of Harris County, Texas, from June 3, 1991 through June 12, 1991.

2. The first question in the charge was:

> Did the negligence, if any, of Intershop Real Estate Services, Inc., proximately cause the occurrence in question?

3. When the vote was initially taken I voted to answer the question "yes". We then discussed the evidence. I insisted that everyone give their reasons for the way they were voting. I listened very carefully to what everyone had to say.

4. After several hours of discussion, and after reviewing the evidence, I changed my mind. I finally concluded that I should answer the question "no". I still stand by my answer.

5. I took my job as a juror very seriously. These were peoples lives we were dealing with. No one rushed me and no one pressured me into changing my answer. I felt a lot of sympathy for the family, but I set my feelings aside as we were instructed.

6. Based upon the evidence, the judge's instructions and the charge, I felt the first question should be answered "no".

7. In answering this question, I followed my juror's oath and considered only the evidence presented in the trial and the judge's instructions. I was not influenced by any passion, prejudice or bias and did not consider any such prejudice, passion or bias in reaching my verdict.

8. All of the foregoing is true and correct and within my personal knowledge.

Further the affiant sayeth not.

/s/ ELIZABETH WALLS GRAHAM
Elizabeth Walls Graham

Sworn to and subscribed before me this the 1st day of August, 1991.

/s/ DANITA JO HOEPPNER
Notary Public
My commission expires: 10-24-92

EXHIBIT C
To Defendants' Motion for Reconsideration

AFFIDAVIT OF CORNELIUS LLOYD WILLIAMS

STATE OF TEXAS §
§
COUNTY OF HARRIS §

CAME BEFORE ME, the undersigned Notary Public, a person known to me to be CORNELIUS LLOYD WILLIAMS, and stated that he is over the age of 18 years, that he has not been convicted of any crimes and is of sound mind. The affiant further stated that:

1. My name is CORNELIUS LLOYD WILLIAMS. I was a juror in the case of *Gregorio Garcia, et al. vs. Avala of Texas, Inc., et al.*; Cause No. 90-13234, which was tried in the 269th Judicial District Court of Harris County, Texas, from June 3, 1991 through June 12, 1991.

2. When the jury convened we considered the first question, which was:

> Did the negligence, if any, of Intershop Real Estate Services, Inc., proximately cause the occurrence in question?

When we first voted on this question, I voted to answer the question "yes". The other jurors votes were counted and the vote was 8-4 to answer the question "no". We then began to discuss our points of view. After going over all of the evidence, including the crimes that had occurred at the shopping center and the diagram of the shopping center, I determined, after reflection, that the question should be answered "no".

3. In answering the question, I was not influenced by anything other than the evidence and the judge's instructions. I was not pressured into changing my answer and I would not have changed my answer under pressure.

4. I took my oath as a juror very seriously. I felt sorry for the family of Mrs. Garcia, but the judge told us not to consider sympathy in making our decision. Upon reflection, I believe that I took my job seriously, as did the other jurors and I would still answer the question "no".

5. I was not influenced by any passion, prejudice or bias and did not consider any such prejudice, passion or bias in reaching my verdict.

6. All of the foregoing is true and correct and within my personal knowledge.

Further the affiant sayeth not.

/s/ CORNELIUS WILLIAMS
Cornelius Lloyd Williams

Sworn to and subscribed before me this the 5th day of August, 1991.

/s/ DANITA JO HOEPPNER
Notary Public
My commission expires: 10-24-92

EXHIBIT D
To Defendants' Motion for Reconsideration
AFFIDAVIT OF JEFFREY MAYNE WALLIS

STATE OF TEXAS §
§
COUNTY OF HARRIS §

CAME BEFORE ME, the undersigned Notary Public, a person known to me to be JEFFREY MAYNE WALLIS, and stated that he is over the age of 18 years, that he has not been convicted of any crimes and is of sound mind. The affiant further stated that:

1. My name is JEFFREY MAYNE WALLIS. I was a juror in the case of *Gregorio Garcia, et al. vs. Avala of Texas, Inc., et al.;* Cause No. 90-13234, which was tried in the 269th Judicial District Court of .Harris County, Texas, from June 3, 1991 through June 12, 1991.

2. The first question the jury had to answer was:

> Did the negligence, if any, of Intershop Real Estate Services, Inc., proximately cause the occurrence in question?

3. I carefully listened to all of the evidence and the court's instructions. I took my vote in the case very seriously and made my decision on the evidence alone. In the jury room the jurors went over all of the evidence in the case.

4. I have been on another jury. On that occasion some jurors discussed things the judge explicitly told us not to discuss. None of that occurred in this case. I did not hear any jurors discuss anything other than the evidence in the case.

5. None of the jurors tried to pressure other jurors. In making my decision I was not motivated by anything other than the evidence. I voted "no" to the first question. I simply did not feel the plaintiffs proved that the security at the

shopping center or the lack of security was a proximate cause of Mrs. Garcia's death.

6. After the trial the judge asked us in chambers why we were so somber. I stated that we felt sorry for the Garcia family. The judge indicated that he would have done the same thing we did if he had been on the jury.

7. All of the foregoing is true and correct and within my personal knowledge.

FURTHER THE AFFIANT SAYETH NOT.

/s/ JEFFREY M. WALLIS
Jeffrey Mayne Wallis

Sworn to and subscribed before me this the 1st day of August, 1991.

/s/ KAREY DUBIEL DYE
Notary Public
My commission expires: 10-20-94

EXHIBIT E
To Defendants' Motion for Reconsideration
AFFIDAVIT OF JAMES MITCHELL WILSON

STATE OF TEXAS §
§
COUNTY OF HARRIS §

CAME BEFORE ME, the undersigned Notary Public, a person known to me to be JAMES MITCHELL WILSON, and stated that he is over the age of 18 years, that he has not been convicted of any crimes and is of sound mind. The affiant further stated that:

1. My name is JAMES MITCHELL WILSON. I was a juror in the case of *Gregorio Garcia, et al. vs. Avala of Texas, Inc., et al.*; Cause No. 90-13234, which was tried in the 269th Judicial District Court of Harris County, Texas, from June 3, 1991 through June 12, 1991. The first question we were asked was:

> Did the negligence, if any, of Intershop Real Estate Services, Inc., proximately cause the occurrence in question?

I voted to answer this question "no". Initially, the vote was 8-4 to vote no, but after a few hours of discussion, the vote was 10-2. I was a member of the majority of 10 who voted no. I made my decision based on the evidence and the instructions of Judge West. Based on the whole picture, I did not believe that a security guard would have deterred the person who committed the crime even if he had been close by. I didn't think the plaintiffs proved that the failure to have two unarmed security guards was a proximate cause of Mrs. Garcia's death.

In answering this question, I followed my juror's oath and considered only the evidence presented in the trial and the judge's instructions. I was not influenced by any passion,

prejudice or bias and did not consider any such prejudice, passion or bias in reaching my verdict.

The discussions between the jurors were calm. I did not hear anyone discuss anything other than the evidence presented in court.

After we voted, Judge West asked us into his chambers. Judge West told us that he agreed with our decision and that we did a good job.

2. All of the foregoing is true and correct and within my personal knowledge.

Further the affiant sayeth not.

/s/ JAMES M. WILSON
James Mitchell Wilson

Sworn to and subscribed before me this the 1st day of August, 1991.

/s/ KAREY DUBIEL DYE
Notary Public
My commission expires: 10-20-94

EXHIBIT F
To Defendants' Motion for Reconsideration
AFFIDAVIT OF MARC CHARLES LANGLAND

STATE OF TEXAS §
§
COUNTY OF HARRIS §

CAME BEFORE ME, the undersigned Notary Public, a person known to me to be MARC CHARLES LANGLAND, and stated that he is over the age of 18 years, that he has not been convicted of any crimes and is of sound mind. The affiant further stated that:

1. My name is MARC CHARLES LANGLAND. I was a juror in the case of *Gregorio Garcia, et al. vs. Avala of Texas, Inc., et al.*; Cause No. 90-13234, which was tried in the 269th Judicial District Court of Harris County, Texas, from June 3, 1991 through June 12, 1991. The first question the jury had to answer was:

> Did the negligence, if any, of Intershop Real Estate Services, Inc., proximately cause the occurrence in question?

At the end of our deliberation, the jurors voted 10-2 to answer the question "no". I took my duty as a juror extremely seriously, and I believe the other jurors did also. We were repeatedly told by the judge and the lawyers to put aside our sympathy, which was difficult, because my heart went out to the family of Mrs. Garcia. Based on the evidence presented by the lawyers, and the judge's instructions, I answer the first question "no". I was not motivated in my answer by anything other than the evidence and the charge. In the discussions among the jurors, no other factor was raised. It was my opinion that this terrible crime was not foreseeable and that security guards would have made no difference.

After the trial, Judge West took us to his chambers. He told us that this case would not be tried again. He said nothing had been done wrong and he thought we reached the right decision. He said we were like the Supreme Court and our decision was final.

In answering question number 1, I followed my juror's oath and considered only the evidence presented in the trial and the judge's instructions. I was not influenced by any passion, prejudice or bias and did not consider any such prejudice, passion or bias in reaching my verdict.

2. All of the foregoing is true and correct and within my personal knowledge.

Further the affiant sayeth not.

/s/ MARC C. LANGLAND
Marc Charles Langland

Sworn to and subscribed before me this the 1st day of August, 1991.

/s/ KAREY DUBIEL DYE
Notary Public
My commission expires: 10-20-94

EXHIBIT G
To Defendants' Motion for Reconsideration
AFFIDAVIT OF PAUL CURTIS GOODWIN

STATE OF TEXAS §
§
COUNTY OF HARRIS §

CAME BEFORE ME, the undersigned Notary Public, a person known to me to be PAUL CURTIS GOODWIN, and stated that he is over the age of 18 years, that he has not been convicted of any crimes and is of sound mind. The affiant further stated that:

1. My name is PAUL CURTIS GOODWIN. I was a juror in the case of *Gregorio Garcia, et al. vs. Avala of Texas, Inc., et al.*; Cause No. 90-13234, which was tried in the 269th Judicial District Court of Harris County, Texas, from June 3, 1991 through June 12, 1991. The jury, after deliberation, answered the first question with regard to negligence and proximate cause "NO". That first question was:

> Did the negligence, if any, of Intershop Real Estate Services, Inc., proximately cause the occurrence in question?

I sat through the entire case and listened to all of the evidence. I also listened carefully to all of the instructions. Based upon what I heard and saw I did not believe that the plaintiffs proved their case. I felt that Mrs. Garcia's murder was a random act of violence, and that the lack of security guards was not a cause of her death.

In answering this question, I followed my juror's oath and considered only the evidence presented in the trial and the judge's instructions. I was not influenced by any passion, prejudice or bias and did not consider any such prejudice, passion or bias in reaching my verdict.

After the trial, Judge West questioned the jury at length about the reasons for the verdict. The ten jurors who joined the verdict did not indicate they were influenced by anything other than the evidence. Judge West asked me about my employment with Texaco. My employment with Texaco did not in any way affect my decision, which was based solely on the evidence.

2. All of the foregoing is true and correct and within my personal knowledge.

Further the affiant sayeth not.

/s/ PAUL C. GOODWIN
Paul Curtis Goodwin

Sworn to and subscribed before me this the 29th day of July, 1991.

/s/ DANITA JO HOEPPNER
Notary Public
My commission expires: 10-24-92

EXHIBIT H
To Defendants' Motion for Reconsideration
AFFIDAVIT OF HOWARD ROBERT MILLER

STATE OF TEXAS §
§
COUNTY OF HARRIS §

CAME BEFORE ME, the undersigned Notary Public, a person known to me to be HOWARD ROBERT MILLER, and stated that he is over the age of 18 years, that he has not been convicted of any crimes and is of sound mind. The affiant further stated that:

1. My name is HOWARD ROBERT MILLER. I was selected as a juror in the case of *Gregorio Garcia, et al. vs. Avala of Texas, Inc., et al.*; Cause No. 90-13234, which was tried in the 269th Judicial District Court of Harris County, Texas, from June 3, 1991 through June 12, 1991. The jury, after deliberation, answered the first question with regard to negligence and proximate cause "NO". The first question was:

> Did the negligence, if any, of Intershop Real Estate Services, Inc., proximately cause the occurrence in question?

I listened to all of the evidence presented. I also listened to the judge's instructions as well as the arguments of counsel. After going back to the jury room I reviewed the evidence with all of the jurors. In answering this question, I followed my oath and considered only the evidence presented in the trial and the judge's instructions. No other jurors brought up any reasons for deciding the case other than the evidence. I was not influenced by any passion, prejudice or bias and did not consider any such prejudice, passion or bias in reaching my verdict. I simply did not feel that the plaintiffs carried their burden of proof with respect to proximate cause.

2. All of the foregoing is true and correct and within my personal knowledge.

Further the affiant sayeth not.

/s/ HOWARD R. MILLER

Howard Robert Miller

Sworn to and subscribed before me this the 29th day of July, 1991.

/s/ DANITA JO HOEPPNER

Notary Public
My commission expires: 10-24-92

EXHIBIT I
To Defendants' Motion for Reconsideration
AFFIDAVIT OF JOE W. DAVIDSON

STATE OF TEXAS §
§
COUNTY OF HARRIS §

CAME BEFORE ME, the undersigned Notary Public, a person known to me to be JOE W. DAVIDSON, and stated that he is over the age of 18 years, that he has not been convicted of any crimes and is of sound mind. The affiant further stated that:

1. My name is JOE W. DAVIDSON. I was a juror in the case of *Gregorio Garcia, et al. vs. Avala of Texas, Inc., et al.*; Cause No. 90-13234, which was tried in the 269th Judicial District Court of Harris County, Texas, from June 3, 1991 through June 12, 1991.

2. I was in the majority, which voted 10-2. I have read the affidavit of Thomas Clayton. The notary has attached a copy of Mr. Clayton's affidavit to mine and marked it as Exhibit "A". I agree with the affidavit of Mr. Clayton in all respects. I adopt Mr. Clayton's statements as my own.

3. All of the foregoing is true and correct and within my personal knowledge.

Further the affiant sayeth not.

/s/ JOE W. DAVIDSON
Joe W. Davidson

Sworn to and subscribed before me this the 2nd day of August, 1991.

/s/ DANITA JO HOEPPNER
Notary Public
My commission expires: 10-24-92

EXHIBIT J
To Defendants' Motion for Reconsideration
AFFIDAVIT OF RACHEL BRYAN POWELL

STATE OF TEXAS §
§
COUNTY OF HARRIS §

CAME BEFORE ME, the undersigned Notary Public, a person known to me to be RACHEL BRYAN POWELL, and stated that she is over the age of 18 years, that she has not been convicted of any crimes and is of sound mind. The affiant further stated that:

1. My name is RACHEL BRYAN POWELL. I was a juror in the case of *Gregorio Garcia, et al. vs. Avala of Texas, Inc., et al.*; Cause No. 90-13234, which was tried in the 269th Judicial District Court of Harris County, Texas, from June 3, 1991 through June 12, 1991.

2. I was in the majority, which voted 10-2. I have read the affidavit of Thomas Clayton. The notary has attached a copy of Mr. Clayton's affidavit to mine and marked it as Exhibit "A". I agree with the affidavit of Mr. Clayton in all respects. I adopt Mr. Clayton's statements as my own.

3. All of the foregoing is true and correct and within my personal knowledge.

Further the affiant sayeth not.

/s/ RACHEL BRYAN POWELL
Rachel Bryan Powell

Sworn to and subscribed before me this the 1st day of August, 1991.

/s/ GLORIA J. ANESI
Notary Public
My commission expires: 1-16-94

APPENDIX I

IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS
269TH JUDICIAL DISTRICT

NO. 90-13234

GREGORIO GARCIA, ET AL.

VS.

AVALA OF TEXAS, INC., ET AL.

PLAINTIFFS' MOTION FOR NEW TRIAL

Now Come Plaintiffs in the above entitled and numbered cause, and file this their Motion for New Trial, within the time prescribed by law, and move the Court to set aside the verdict of the jury returned June 12, 1991, and to grant a new trial herein upon the following grounds, to-wit:

I.

The jury's answer to Special Issue No. 1, to the effect that the Defendants were not negligent, is so against the greater weight and overwhelming preponderance of the evidence as to be manifestly wrong and clearly unjust.

II.

The jury's answer to Special Issue No. 1, to the effect that the Defendants' negligence was not a proximate cause of the occurrence in question, is so against the greater weight and overwhelming preponderance of the evidence as to be manifestly wrong and clearly unjust.

WHEREFORE, Premises Considered, Plaintiffs pray that the verdict of the jury returned on June 12, 1991, be set aside and that they be granted a new trial.

Pespectfully submitted,

KRIST, GUNN, WELLER, NEUMANN & MORRISON

By: /s/RONALD D. KRIST
Ronald D. Krist

State Bar No. 11727000

17555 El Camino Real
Houston, Texas 77058
(713) 283-8500
(713) 488-3489 (FAX)

CERTIFICATE OF SERVICE

I, RONALD D. KRIST, do hereby certify that on this the 11th day of July, 1991, a true and correct copy of the above and foregoing instrument was mailed by certified mail, return receipt requested, to all attorneys of record.

/s/ RONALD D. KRIST
Ronald D. Krist

APPENDIX J

IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS
269TH JUDICIAL DISTRICT

NO. 90-13234

Houston, Texas, August 26, 1991

GREGORIO GARCIA, ET AL.

VERSUS

AVALA OF TEXAS, INC., ET AL.

TRANSCRIPT OF HEARING BEFORE THE HONORABLE DAVID WEST 269TH DISTRICT COURT JUDGE

MOTION

BE IT REMEMBERED that the above entitled and numbered cause came on for trial before said Honorable Court, David West, Judge Presiding, at the Harris County Civil Courts Building, 301 Fannin, Houston, Texas, on the 26th day of August, 1991, and the following proceedings were had:

APPEARANCES

FOR THE PLAINTIFFS GREGORIO GARCIA, ET AL.:

RONALD D. KRIST AND KEVIN D. KRIST
KRIST, GUNN, WELLER, NEUMANN & MORRISON
17050 El Camino Real
Houston, Texas 77058

FOR ALICIA NICOLE GARCIA:

JIMMY WILLIAMSON
300 Fannin
Suite 300
Houston, Texas 77002

FOR THE DEFENDANTS
AVALA OF TEXAS, INC., ET AL.:

LOUIS E. MC CARTER AND
PHILLIP B. DYE, JR.
Vinson & Elkins
3300 First City Tower
Houston, Texas 77002

* * *

[3-5]

* * *

[MR. MC CARTER:]

They also asked me on what basis the Court granted the new trial. And I said, Well, I couldn't articulate a very good answer, Judge, because it does seem to me, as you pointed out, it was a hard fought, hotly disputed case. Tried by Mr. Krist, who is probably one of the best known, most talented lawyers in Texas, if not in the nation, and his son, Kevin, is certainly extremely capable, and Jimmy Williamson, as you know, is a highly capable lawyer. The case was hotly disputed, vigorously disputed, and we won. And I look on it and I say, Well, you did a good job, the jury was fair, and we know what's going to happen at the next trial. We know what the testimony is. And I kind of scratch my head. And it looks like to me, in light of your ruling, Your Honor, with all due respect, that it's a case that we can't win.

THE COURT: Well, that would be — that's one way to look at it. I just am not going to go into detail. I'll be glad to have a beer with you and discuss — I'll discuss — I've discussed this case with a friend of mine. This is not an easy case to grant a new trial in. I know when I have — I never want to be granting new trials to make up for deficiencies of lawyering. That was not the case in this case. I sure don't like to grant new trials and punish a lawyer. You did a sterling job. So I'm not granting it based on — I told you that before, and I want you to really understand I didn't do this on lawyer performance. When you've got good performances, then that's out of the motion for new trial. No, this was not an easy case to grant a new trial in personally, but I don't — I like to get a finality of trials and let the chips fall where they may. I thought justice demanded that I grant a new trial under the facts and the status of the law as I know it. And I'm the last guy that wants to play Supreme Court.

* * *

[9-12]

* * *

MR. MC CARTER: But, Your Honor, also I think the law is crystal clear that you, as a trial judge, and for that matter an appellate court in ruling on great weight points, which as I understand the basis for their new trial was insufficiency of the evidence, or in other words, it was against the great weight and preponderance of the evidence as to be manifestly unjust, the law is crystal clear, Your Honor, that you, or an appellate court, cannot substitute your judgment for that of the jury.

And I know Your Honor's familiar with these cases, but for example here is an excerpt from the *Larson* case. Judge Kilgarlin said: Trial courts and courts of appeal should be

subject to the same standard for a simple reason. No court is free to substitute his judgment for that of the jury.

And here's another excerpt from Justice Wallace. It's well-established that an appellate court cannot merely substitute its judgment for that of a jury because the Court cannot exercise its constitutional authority to the detriment of the right of trial by a jury which is of equal constitutional stature.

And I have another case here that I'm not going to take the time with the Court but here's Justice Kilgarlin, the *Herbert* case. The law is clear, Your Honor, that you cannot substitute your opinion for that of the jury.

And I think it's also crystal clear, Your Honor, that the Judge — I'm sorry — the jury is the one who decides the facts and the credibility of the witnesses. They decide disputed facts. And you, Your Honor, told the jury panel that. You told the jury that when they were impaneled that they're the sole judges of the credibility of the witnesses and the weight to be given their testimony, and of course that was included in the Court's charge.

Here, for example, when you told the jury panel —

THE COURT: I told them that, didn't I?

MR. MC CARTER: You certainly did, Your Honor.

THE COURT: I've told every jury that, and it's not been true three times in seven years, and I guess I'm going to have to just suck it up when I told them they're going to be the final arbiter of the facts in this case.

MR. MC CARTER: Well, Your Honor, you did, and I don't think there's any question but that is the law . . .

* * *

MR. MC CARTER: My point, Judge, I guess what you're saying, and there's no question in my mind, Your

Honor, that you are a good, honorable man, but I guess what you're saying is that you didn't think justice was served by the jury's verdict. And I don't understand, since we had a jury decide, it's a fair fight, I don't understand why it's justice to have my client pay a bunch of money to the plaintiffs in this case —

THE COURT: No.

MR. MC CARTER: — for the third-party acts which were totally unforeseen by a maniacal, crazy madman. I just don't understand why that is justice.

THE COURT: You're hitting the point. Is that the fact? If it was the sole — if it was in fact the sole proximate cause of another not contributed by any negligence or proximate cause of the defendant, then you're right.

MR. MC CARTER: But sole — sole proximate cause wasn't even submitted, as you know.

THE COURT: I know it wasn't.

* * *

[19-21]

* * *

[MR. MC CARTER:]

Mr. Dye has pointed out, if I understand what he's pointing out to me, that sole proximate cause was not submitted in this case.

THE COURT: No, it wasn't.

MR. MC CARTER: It's incumbent upon the plaintiffs to prove that the negligent conduct of our client, if any, was a proximate cause of the murder. And the jury answered that question no. They either found we were not negligent or they found it was not a proximate cause or they found both. And again, a jury fee was paid, the jury has decided, and I just —

I don't understand how anything is going to be any different next time. We know what the evidence is going to be. We know what the testimony is going to be. I just — in light of the Court's ruling, I don't understand how we're ever going to be able to win this case.

* * *

[MR. MC CARTER:]

The present status of the law is that there's no avenue for us to go with respect to your ruling. That is the present status of the law. It would just seem to me to be much fairer, if you will, that if you decide not to give them a new trial, that they have an avenue, they can go up to the Court of Civil Appeals and those gentlemen and ladies, as I understand it, are the ones that frequently make the rule on insufficiency points. Whether it was against the great weight and preponderance of the evidence.

But under the present status of the law, you know, we have no place to go, Your Honor, and it just seems again that if we're interested in fairness, if we're interested in justice, that what would be fair and just, and I understand that my attempts to get you to change your mind are tough, because my father, late father, who is much smarter than I can ever hope to be, said it takes a very courageous person to admit he's wrong and change his mind. With all due respect to this Court, I think you are mistaken. We had a jury. The jury has spoken. You may disagree with it. I think we won. You gave us a fair trial. You gave everybody a fair trial. I think we won, and I think we're entitled to keep that verdict. Thank you.

APPENDIX K

IN THE COURT OF APPEALS
for the
FIRST DISTRICT OF TEXAS

NO. 01-91-00808-CV

AVALA OF TEXAS, INC., d/b/a THE AVALA GROUP AND d/b/a PLYMOUTH PARK SHOPPING CENTER AND INTERSHOP REAL ESTATE SERVICES, INC., f/k/a HFA MANAGEMENT USA CO.,

Relators

V.

THE HONORABLE DAVID WEST, JUDGE OF THE 269TH DISTRICT COURT OF HARRIS COUNTY, TEXAS,

Respondent

PETITION FOR WRIT OF MANDAMUS FROM THE DISTRICT COURT OF THE 269TH JUDICIAL DISTRICT, HARRIS COUNTY, TEXAS

TO THE HONORABLE JUSTICES OF THE COURT OF APPEALS:

COME NOW Relator Avala of Texas, Inc. d/b/a The Avala Group and d/b/a Plymouth Park Shopping Center and Relator Intershop Real Estate Services, Inc., f/k/a HFA Management USA Co. complaining of the Honorable David West, Judge of the 269th District Court of Harris County, Texas, and file this their Petition for Writ of Mandamus in which Relators ask this Court to issue a Writ of Mandamus

directing Judge West to set aside his order granting a new trial.

JURISDICTION

The Court of Appeals has jurisdiction to grant Relators' Petition for Writ of Mandamus pursuant to TEX. GOV'T CODE ANN. § 22.221(b) (Vernon 1988).

PARTIES

Relators are Avala of Texas, Inc., d/b/a The Avala Group and d/b/a Plymouth Park Shopping Center ("Avala") and Intershop Real Estate Services, Inc., f/k/a HFA Management USA Company ("Intershop"), the Defendants in the underlying lawsuit out of which this mandamus proceeding arose. The underlying lawsuit is styled *Gregorio Garcia, Individually and as Surviving Husband of Patricia Wilson Garcia and as Next Friend of Alicia Nicole Garcia, and Robert G. Wilson and Theresa S. Wilson, Individually and as Surviving Parents of Patricia Wilson Garcia v. Avala of Texas, Inc., d/b/a the Avala Group and d/b/a Plymouth Park Shopping Center, Intershop HFA Management USA Co., and Intershop Real Estate Services, Inc., f/k/a Intershop HFA Management USA Co.*, No. 90-13234, in the 269th Judicial District Court of Harris County, Texas. Relators are represented by Marie R. Yeates, Penelope E. Nicholson, Catherine Bukowski, Louis E. McCarter, and Phillip B. Dye, Jr., of the law firm of Vinson & Elkins, 1001 Fannin Street, 3300 First City Tower, Houston, Texas 77002.

Respondent is the Honorable David West, Judge of the 269th Judicial District Court of Harris County, Texas. The address for Judge West is Harris County Courthouse, 301 Fannin Street, Houston, Texas 77002.

The Real Parties in Interest are Gregorio Garcia (Individually and as Surviving Husband of Patricia Wilson Garcia

and as Next Friend of Alicia Nicole Garcia) and Robert G. Wilson and Theresa S. Wilson (Individually and as Surviving Parents of Patricia Wilson Garcia), the Plaintiffs in the underlying lawsuit out of which this mandamus proceeding arose. Plaintiffs are represented by Ronald D. Krist and Kevin D. Krist of the law firm of Krist, Gunn, Weller, Neumann & Morrison, 17555 El Camino Real, Houston, Texas 77058. The attorney ad litem for minor Plaintiff Alicia Nicole Garcia is Jimmy G. Williamson of Jimmy G. Williamson, P.C., 300 Fannin, Suite 300, Houston, Texas 77002.

INTRODUCTION

Through this Petition for Writ of Mandamus, Relators seek to challenge the unjust and unconstitutional rule that shields a trial judge's order granting a new trial from any review whatsoever unless the order is wholly void or expressly based on a perceived conflict in jury answers. The rule makes a mockery of the jury system by effectively allowing trial courts to toss out errorless jury verdicts for no reason at all. A party who has spent tens of thousands of dollars on one trial and has fairly won a jury verdict should not have to face a retrial based on a whim of the trial judge.

The present case illustrates the injustice caused by the rule exempting new trial orders from appellate review. After a hard fought, sharply contested trial that lasted seven days, the jury returned a verdict in Defendants' favor. Although there was ample evidence in the record to support the jury's verdict, Plaintiffs moved for a new trial on the sole ground that the verdict was against the great weight and overwhelming preponderance of the evidence. To Defendants' amazement, the trial court granted Plaintiffs' motion. The judge apparently believed that the jury reached the wrong result and substituted his view of the evidence for that of the jury.

As the Statement of Facts from the trial filed along with this Petition demonstrates, the jury's verdict was *not* against the great weight and preponderance of the evidence.[1] The clear abuse of discretion committed by the trial judge in granting Plaintiffs' Motion for New Trial should not be a wrong without a remedy. Defendants should not be subjected to a second trial merely because the trial judge disagreed with the verdict returned by the jury in the first trial. This Court has the power to issue a writ of mandamus directing the trial court to set aside its order granting a new trial and should do so. The facts of this case demand relief.

Patricia Wilson Garcia was brutally murdered as she was apparently attempting to buy stamps at a self-service postal island located in the parking lot of a shopping center. The police never caught her attacker. Her husband, daughter, and parents sued Avala (the owner of the shopping center) and Intershop (the manager of the shopping center) for negligence claiming that inadequate security was responsible for Mrs. Garcia's death. (Ex. 1.) During the seven-day trial, Plaintiffs presented evidence criticizing security at the shopping center where the murder occurred, while Defendants challenged Plaintiffs' evidence and introduced their own evidence that the murder was unforeseeable, that Defendants acted reasonably under the circumstances, and that no reasonable extra security measures would have

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[1] Relators have filed the Statement of Facts from the trial as Exhibit 11 to this Petition. The Statement of Facts includes a transcription of the entire trial, but does not include copies of the exhibits introduced at trial because many of those exhibits are photographs and other items that cannot readily be copied. Along with this Petition, Relators are filing a motion seeking permission to have the original exhibits transferred to this Court from the trial court so that this Court will have a complete record of the evidence introduced at trial.

prevented the attack. (Ex. 11.) After the parties rested, Plaintiffs elected not to submit any questions to the jury concerning the liability of Avala (the shopping center owner), but rather to proceed solely against Intershop (the shopping center manager). The jury returned a verdict absolving Intershop of all liability by answering "No" to Jury Question No. 1, which asked,

> Did the negligence, if any, of Intershop Real Estate Services, Inc. proximately cause the occurrence in question?

(Ex. 3.)

Judge West told the jurors that they had reached the right decision and entered judgment on the basis of their verdict. (Ex. 8-A, 8-D, 8-E, 8-F, 8-I, 8-J[2] and Ex. 4.) Six weeks after the jury returned its verdict, however, he granted Plaintiffs' Motion for New Trial. (Ex. 7.) The *sole basis* for that motion was Plaintiffs' contention that the jury's answer to Question No. 1 was against the great weight and overwhelming preponderance of the evidence. (Ex. 5.) Inexplicably, Judge West also granted a new trial as to Avala, even though Plaintiffs had waived their right to proceed against Avala by failing to request any jury issues concerning Avala's liability. Defendants filed a Motion for Reconsideration, but that motion was denied. (Ex. 8, Ex. 9, and Ex. 12.)

Judge West's decision to grant Plaintiffs' Motion for New Trial was wrong and constituted a clear abuse of discretion.

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[2] Exhibit 8 is Defendants' Motion for Reconsideration. The motion has a number of exhibits attached to it, including affidavits from the ten jurors who comprised the majority. In their affidavits, six of the jurors made statements to the effect that Judge West told them that they had made the right decision. Whenever a juror affidavit or other attachment to the Motion for Reconsideration is referred to in this Petition, it will be referred to as Ex. 8-A, 8-B, 8-C, etc. *See* footnote 3, *infra*, regarding the admissibility of the affidavits.

The evidence was hotly contested, with each side presenting evidence in support of its own position as well as challenging the evidence presented by the other side. The jury clearly was entitled to believe Defendants' evidence rather than Plaintiffs' evidence. The finding that Plaintiffs did not carry their burden of proof is amply supported by the record.

In reaching its verdict, the jury considered all of the evidence and took to heart Judge West's admonition not to be swayed by passion or sympathy. (Ex. 8-A – 8-J.) This is a tragic case, and it took courage for the jury to return a verdict based on its objective view of the facts rather than on sympathy for the family of the 22-year old victim who was stabbed to death during her seventh month of pregnancy. Judge West had no right to substitute his judgment for that of the jury, which is clearly what he did.

Although Texas law prohibits a trial court from substituting its view of the evidence for that of the jury, a party aggrieved by a violation of that rule in the granting of a new trial currently has no remedy. An order granting a new trial is not appealable, and the case law suggests that mandamus is not available to set aside new trial orders unless they are wholly void or expressly based on a perceived conflict in jury answers. There is no reason why new trial orders should be exempt from review when every other trial court order is subject to review, either by mandamus or direct appeal. The self-imposed restrictions applied by Texas appellate courts to limit their review of new trial orders are unconstitutional in that they deprive litigants of their right to a jury trial, their right to meaningful access to the courts, their right to due process of law, their right to equal protection, and their right to appellate review. Through this proceeding, Relators ask this Court to cast aside those unconstitutional artificial restrictions and to issue a writ of mandamus directing Judge

West to set aside his clearly erroneous order granting a new trial.

Judge West's order constituted a clear abuse of discretion and should be set aside for the following reasons:

(1) Plaintiffs waived any cause of action against Avala by failing to request any jury questions concerning Avala's liability;

(2) Plaintiffs' Motion for New Trial was defective in that it failed to specify the particulars in which the evidence allegedly was insufficient to support the jury verdict;

(3) Judge West failed to detail the evidence both in support of and contrary to the jury's finding before granting a new trial based on insufficiency of the evidence; and

(4) The evidence was clearly sufficient to support the jury's verdict and therefore the order granting a new trial violated Defendants' federal and state constitutional rights to a trial by jury, to access to the courts, to due process of law, to equal protection, and to appellate review.

FACTUAL BACKGROUND

A brief review of the evidence presented at trial shows that there was ample evidence to support the jury's verdict.

The general facts surrounding Mrs. Garcia's murder were undisputed. Mrs. Garcia was stabbed six or seven times in the back of the head and neck between 8:45 and 9:00 p.m. on April 29, 1988. (Ex. 11 at Vol. V, pp. 1146, 1143.) The postal island where Mrs. Garcia was killed was well lighted. (Ex. 11 at Vol. V, pp. 1142, 1140.) Some of the stores in the shopping center had closed, but many remained open. (Ex. 11 at Vol. V, p. 1140; Vol. III, p. 609.) Although no one witnessed the murder, there were still people in the parking

lot at the time it occurred. (Ex. 11 at Vol. V, p. 1141; Vol. III, p. 609.)

Defendants called Dr. Charles S. Petty, who was the Chief Medical Examiner and Director of the Criminal Laboratory for Dallas County at the time of the attack, as an expert witness. (Ex. 11 at Vol. III, p. 672.) Dr. Petty's testimony indicated that Mrs. Garcia was killed quickly. He testified that "one or the other of the fatal wounds was inflicted early on in this affray" and that there were no defensive wounds or other signs of a struggle. (Ex. 11 at Vol. III, pp. 694, 707.) In Dr. Petty's opinion, Mrs. Garcia's murderer "was under some sexual tension" because the nature of the wounds "represent a great deal of sexual energy." (Ex. 11 at Vol. III, p. 692.)

Defendants also called Mr. William Degan as an expert witness on security. Mr. Degan testified that Defendants "acted in a very prudent manner" in implementing their security program. (Ex. 11 at Vol. V, pp. 1130-31.) He also testified that he had reviewed the statistics concerning crime in the shopping center and that those statistics provided no basis for anticipating the kind of violent crime that took Mrs. Garcia's life. (Ex. 11 at Vol. V, p. 1136.) In his words, "such an irrational and brutal crime [was] not foreseeable." (Ex. 11 at Vol. V, p. 1136.) Mr. Degan further testified that the murder was "so vicious and executed so quickly, so irrationally" that he did not think that the presence of roving security personnel in the shopping center would have prevented the crime. (Ex. 11 at Vol. V, pp. 1145-46. *See also* 1214.)

Predictably enough, Plaintiffs' security expert, Mr. Robert Waldhuber, disagreed with Mr. Degan's opinion. Mr. Waldhuber testified to the effect that Defendants' security was inadequate and that such inadequacy was a proximate cause of Mrs. Garcia's vicious murder. In his opinion,

Defendants should have employed two unarmed security guards — one to patrol the 77-acre parking lot and one to guard the postal island. (Ex. 11 at Vol. III, pp. 626-627.) Yet even Mr. Waldhuber admitted that unarmed security guards might not have been able to prevent the brutal attack on Mrs. Garcia. (Ex. 11 at Vol. III, pp. 637-38.) He also admitted that good lighting is a recognized form of security, but that adequate lighting did not prevent Mrs. Garcia's murder. (Ex. 11 at Vol. III, pp. 599, 610-11, 621.) In addition, he agreed that the presence of people generally serves as a deterrent to crime, but did not do so in this case. (Ex. 11 at Vol. III, pp. 604, 612, 621.) Finally, he recognized that the presence of cars passing slowly through the parking lot did not stop the killer. (Ex. 11 at Vol. III, pp. 613-14, 621.)

In sum, the evidence concerning negligence and proximate cause was hotly disputed. The verdict returned by the jury was clearly not against the great weight and preponderance of the evidence. To the contrary, there was ample evidence in the record to support the verdict.

In affidavits submitted to the trial court in connection with Defendants' Motion for Reconsideration, the ten jurors who composed the majority stated that they had carefully considered all of the evidence in reaching their verdict. (Ex. 8-A – 8-J.)[3] A further indication of the jury's thorough

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[3] Plaintiffs made no objection to the juror affidavits when Defendants tendered them into evidence at the hearing on the Motion for Reconsideration. (Ex. 12, p. 25.) Moreover, the affidavits were admissible because they did not seek to impeach the verdict. *See Shaw v. Greater Houston Transp. Co.*, 791 S.W.2d 204, 210 (Tex. App. — Corpus Christi 1990, no writ) (holding that five juror affidavits were admissible because "relevant" and "helpful" on issue other than to impeach the jury verdict); *Caylat v. Houston E. & W.T. Ry.*, 113 Tex. 131, 252 S.W. 478, 482 (Tex. Comm'n App. 1923, opinion adopted) (receipt of juror affidavits that do not impeach the jury verdict "contravenes no announced principle of public policy"). The affidavits show that the jurors were not subject to any outside

analysis of the evidence can be found in the marks that they made on Defendants' Exhibit 3, a map of the shopping center. (Ex. 8-L.) The jury marked the location of the incidents that Plaintiffs contended should have apprised Defendants of the need for greater security and obviously concluded that since none of the incidents had occurred near the postal island, Defendants could not have foreseen any need to station a security guard at the postal island. In their affidavits, the jurors affirmed that they had decided the case based solely on the evidence and had not considered any outside influence. Although they felt very sorry for Plaintiffs, they believed that the evidence compelled them to reach the verdict that they did.

ARGUMENT AND AUTHORITIES

I. JUDGES MAY NOT SUBSTITUTE THEIR VIEW OF THE EVIDENCE FOR THAT OF THE JURY.

Throughout the history of Texas jurisprudence, the opinions handed down by the courts of this State have consistently "demonstrate[d] respect for jury verdicts." *Herbert v. Herbert,* 754 S.W.2d 141, 144 (Tex. 1988). Indeed, "the sanctity of the right of trial by jury" is embedded in the Texas Constitution. *Texas Farmers Ins. Co. v. McGuire,* 744 S.W.2d 601, 603 (Tex. 1988). Section 15 of article I of the constitution mandates that the right to a jury trial "shall remain inviolate." TEX. CONST. art. I, § 15.

Because of the great deference to jury verdicts required by the Texas Constitution, trial courts have been expressly prohibited from substituting their view of the evidence for that of the jury since at least 1898. In *Choate v. San Antonio & A. P. Ry.*, 91 Tex. 406, 44 S.W. 69 (1898), the Texas

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influence, but rather decided the case based solely on the evidence.

Supreme Court wrote, "clearly the trial court cannot set aside the verdict, and substitute its finding." More recently, the supreme court has held, "*no court* is free to substitute its judgment for that of the jury." *Larson v. Cactus Utility Co.*, 730 S.W.2d 640, 641 (Tex. 1987) (emphasis added).

While the Texas Constitution makes the right to trial by jury "inviolate," the constitution also gives courts of appeals the power to review the sufficiency of the evidence to support a jury finding. TEX. CONST. art. V, § 6. *Herbert*, 754 S.W.2d at 143. Several courts have noted that there is a certain tension between the constitutional provision concerning the people's right to a jury determination of disputed facts and the constitutional provision concerning the appellate courts' power to review jury fact findings. *See, e.g., id.* at 142-44; *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 633-36 (Tex. 1986). The courts have resolved that tension by strictly limiting an appellate court's authority to review the fact findings made by a jury. An appellate court may set aside a jury verdict on the ground that the evidence is factually insufficient to support that verdict only after considering all of the evidence and concluding that the verdict is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986). Furthermore, when reversing on insufficiency grounds, an appellate court must "detail the evidence relevant to the issue in consideration and clearly state why the jury's finding is factually insufficient or is so against the great weight and preponderance as to be manifestly unjust; why it shocks the conscience; or clearly demonstrates bias." *Pool*, 715 S.W.2d at 635. The appellate court also must demonstrate how the evidence contrary to the verdict greatly outweighs the evidence in support of the verdict. *Id.*

Like appellate courts, trial courts have the power to set aside jury verdicts on factual sufficiency grounds, but in

doing so they are subject to the same standards as appellate courts. *Larson*, 730 S.W.2d at 641. *Hopson v. Gulf Oil Corp.*, 150 Tex. 1, 237 S.W.2d 352, 358 (1951); *Choate*, 44 S.W. at 69. In rejecting an argument that trial courts should have greater latitude than appellate courts in ordering remittitur, the *Larson* court observed that allowing a trial court to reduce the damages awarded by a jury when the evidence is factually sufficient to support those damages would "rob[] of its vitality the constitutionally mandated right of trial by jury." 730 S.W.2d at 641. The court also noted that giving trial judges broad discretion to order remittitur would permit them to substitute their judgment for that of the jury. *Id.* Reaffirming this State's longstanding commitment to trial by jury, the court concluded, *"Trial courts and courts of appeals should be subject to the same standard for a simple reason: no court is free to substitute its judgment for that of the jury." Id.* (emphasis added).

II. THERE IS CURRENTLY NO WAY TO OBTAIN REVIEW OF A TRIAL COURT'S IMPROPER DECISION TO SUBSTITUTE ITS VIEW OF THE EVIDENCE FOR THAT OF THE JURY IN THE GRANTING OF A NEW TRIAL.

Although Texas law clearly makes trial courts subject to the same standards as appellate courts in setting aside jury verdicts based on factual insufficiency of the evidence, there is currently no way to obtain review of a trial court's improper decision to substitute its view of the evidence for that of the jury in the granting of a new trial. An order granting a new trial is interlocutory and therefore not immediately appealable. *Cf.* TEX. CIV. PRAC. & REM. CODE ANN. § 51.012 (Vernon 1987) (listing the only appealable interlocutory orders). Nor are new trial orders subject to review following the entry of final judgment after a second trial. *Cummins v. Paisan Const. Co.*, 682 S.W.2d 235, 235-36

(Tex. 1984); *Equitable Life Assur. Soc. v. Murdock*, 219 S.W.2d 159, 164 (Tex. Civ. App. — El Paso 1949, writ ref'd n.r.e.). Finally, the courts of this State have declined to use the writ of mandamus to compel trial courts to set aside erroneous orders granting new trials except when the orders are wholly void or based on a perceived conflict in jury answers. *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 918 (Tex. 1985).

As a practical matter, under the current state of the law, a trial court can order a new trial for any reason — or no reason at all — and its decision will never be subject to even the most minimal scrutiny. As the law now stands, trial courts can toss out jury verdicts on the merest of whims. Every other trial court order is subject to some kind of review, either by appeal or mandamus, and there is simply no basis for treating new trial orders differently from other orders. There is no reason why a trial judge should be allowed to set aside a hard fought, fairly won jury verdict simply because the judge believes the jury reached the wrong result. The refusal of the courts of this State to allow any review of orders granting new trials puts Texas in a minority of only four jurisdictions that preclude review of new trial orders. (Ex. 10.)

III. MANDAMUS SHOULD ISSUE TO CORRECT THE TRIAL COURT'S CLEAR ABUSE OF DISCRETION IN GRANTING A NEW TRIAL.

A. This Court Has Mandamus Jurisdiction to Review Clear Abuses of Discretion By the Trial Court.

The injustice caused by the present rule denying review of new trial orders could be cured by allowing mandamus to be used to correct clear abuses of discretion in the granting of new trials. Texas appellate courts have the authority to issue writs of mandamus to correct clear abuses of discretion by

trial courts when there is no adequate remedy at law. *Johnson v. Fourth Court of Appeals,* 700 S.W.2d at 917. A party aggrieved by the granting of a new trial currently has ***no*** remedy at law because orders granting new trials are not at this time reviewable on appeal. *See supra* at pp. 12-13. Moreover, even if review of a new trial order could be obtained after a retrial, that remedy would not be "equally convenient, beneficial, and effective as the proceeding by mandamus." *Cleveland v. Ward,* 116 Tex. 1, 285 S.W. 1063, 1068-69 (1926).

Substantial harm flows from the granting of a new trial. The prevailing party is required to fund the litigation all over again, and the delay threatens the party's right of meaningful access to the courts. The parties have completed an expensive and time-consuming trial and now face another. Difficult issues have been sharply contested. Consideration of an order granting a new trial by an appellate court through a mandamus proceeding could materially advance the termination of the litigation and avoid exceptional expense to the parties. Mandamus review would not be overly burdensome to either party and would be less expensive than the cost of a new trial.

B. Mandamus Is Particularly Appropriate in Light of Recent Trends in the Law Involving the Issuance of Mandamus.

Appellate courts currently issue writs of mandamus when trial courts commit a clear abuse of discretion in numerous contexts. For example, the supreme court and courts of appeals now routinely issue writs of mandamus to compel or preclude discovery in a variety of circumstances. *See, e.g., Masinga v. Whittington,* 792 S.W.2d 940 (Tex. 1990) (mandamus conditionally granted to vacate an order preventing the videotaping of a deposition, which the supreme court found to be an abuse of discretion); *Lunsford v. Morris,*

746 S.W.2d 471 (Tex. 1988) (mandamus conditionally granted to vacate order disallowing discovery of net worth); *Garcia v. Peeples*, 734 S.W.2d 343 (Tex. 1987) (mandamus conditionally granted to vacate pretrial discovery order limiting use of discovery documents); *Ginsberg v. Fifth Court of Appeals*, 686 S.W.2d 105 (Tex. 1985) (mandamus conditionally granted to vacate order of court of appeals precluding trial court from making an independent determination of the discoverability and admissibility of medical records).

Another recent example of the expanded use of mandamus can be seen in the case of *Henderson v. O'Neill*, 797 S.W.2d 905 (Tex. 1990). In *Henderson*, the supreme court issued a writ of mandamus to compel the trial court to vacate an order granting a change of venue because the plaintiff had less than 45 days notice of the hearing. Interlocutory venue orders can be appealed after a trial on the merits. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.064(b) (Vernon 1988). Nevertheless, the court granted the requested mandamus relief.

An even more recent example of expanded mandamus review is seen in *Transamerican Natural Gas Corp. v. Powell*, 34 Tex. Sup. Ct. J. 701 (June 19, 1991). In that case, the supreme court made mandamus relief available to review a trial court's abuse of discretion in imposing discovery sanctions that have the effect of precluding a decision on the merits of a party's claim. The supreme court concluded that the remedy by way of appeal was completely inadequate. *Id.* at 706. Interestingly, the court granted the requested mandamus relief despite the clear language of TEX. R. CIV. P. 215 that sanctions for discovery abuse are reviewable by appeal. *See also Braden v. Downey*, 34 Tex. Sup. Ct. J. 721 (June 19, 1991) (mandamus granted to direct trial court to defer imposition of monetary and community service sanctions until after entry of final judgment).

In light of the expanded availability of mandamus relief, mandamus clearly should be available to set aside new trial orders. An order granting a new trial is the most onerous of all trial court orders, especially in hotly contested cases where the parties have already spent hundreds of thousands of dollars on one trial and now must face the expense of a second trial. With mandamus available to resolve squabbles over whether particular documents are discoverable and whether a particular deposition should be videotaped, it is absurd for mandamus not to be available to determine whether a party who has prevailed in one trial should have to undergo a second.

C. The Rule Precluding Review of New Trial Orders Should Be Discarded As a Historical Anomaly.

The rationale for the rule precluding review of new trial orders is unclear. From 1872 until at least 1911, Texas courts allowed mandamus to be used to set aside orders granting new trials. In *Lloyd v. Brinck*, 35 Tex. 1 (1872), the Texas Supreme Court issued a writ of mandamus directing the trial court to set aside its order granting a new trial, ruling that there was no error in the jury's verdict and that the granting of a new trial constituted a clear abuse of discretion. The *Brinck* court held that if a party has a clear right to judgment and the trial court commits an abuse of discretion in ordering a new trial, mandamus is the proper remedy to set aside the new trial order. The court further recognized that an appeal from a final judgment after a retrial would be "wholly inadequate." *Id.* at 8.

Brinck has never been expressly overruled or modified by any Texas court. Yet, for reasons difficult to discern, the courts of this State subsequently created a rule exempting new trial orders from review and have continued to follow that rule blindly even though the use of mandamus has

expanded significantly in recent years. *See supra* at pp. 14-16.

The peculiar rule exempting new trial orders from review appears to have had its origin in the 1911 decision of *Wright v. Swayne*, 104 Tex. 440, 140 S.W. 221 (1911). Without mentioning *Brinck*, the *Wright* court held that mandamus would not issue unless the order under consideration was "wholly and absolutely void." Although *Wright* involved a motion for new trial, it is impossible to tell from the court's opinion whether the court intended to restrict mandamus jurisdiction in general by only allowing mandamus for "void" orders or rather intended to create a special rule for new trial orders.

Then in 1926 the supreme court decided *Gulf, C. & S. F. Ry. v. Canty*, 115 Tex. 537, 285 S.W. 296 (1926), in which the court issued a writ of mandamus overturning a new trial order that was based on the trial court's erroneous conclusion that there was an irreconcilable conflict among certain jury findings. The *Canty* court noted that since there was, in fact, no conflict in the jury answers, the trial judge had a ministerial nondiscretionary duty to enter judgment based upon the verdict, but the court also cited the *Brinck* opinion with approval. The *Canty* court's reliance on *Brinck* shows that the court had no intention of overruling *Brinck* and saw no inconsistency between the two decisions.

Although the meaning and import of *Wright* and *Canty* are far from clear, one thing is certain: later courts seized upon the two decisions as authority for the proposition that an order granting a new trial can only be set aside if (1) the order is void or (2) the basis for the order is a conflict in the issues.[4] Born of a misunderstanding of precedent, the rule

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[4] *See, e.g., Employers Reinsurance Corp. v. Holland*, 162 Tex. 394, 347 S.W.2d 605 (1961); *Southland-Greyhound Lines, Inc. v. Richardson*, 126 Tex. 118, 86 S.W.2d 731 (1935); *Missouri-*

has become entrenched in Texas jurisprudence even though there is not — and never has been — any reason for its existence. The rule is nothing more than a historical anomaly and should be discarded.[5]

D. The Texas Legislature Has Recognized the Right to Review of New Trial Orders.

Continued adherence to the rule exempting new trial orders from review is particularly anomalous since the Texas legislature long ago recognized that new trial orders should be subject to some kind of review. In 1925, the legislature enacted a statute allowing appeals from every order granting a motion for new trial. Act of February 23, 1925, 39th Leg., R.S., ch. 18, § A, 1925 Tex. Gen. Laws 45. Two years later, the legislature suspended the right to appeal new trial orders, proclaiming that "the granting of new trials is largely discretionary with the trial court and not subject to reversal *except for abuse of discretion...*" Act of February 21, 1927, 40th Leg., R.S., ch. 52, § 2, 1927 Tex. Gen. Laws 75-76 (emphasis added). Thus, the legislature recognized that new trial orders could be reviewed for abuse of discretion. But contrary to this explicit acknowledgment of a right to some type of review (presumably by mandamus since there is currently no right to appeal after a second judgment), Texas

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K.-T. R.R. v. Brewster, 124 Tex. 244, 78 S.W.2d 575 (1934); *Hunsinger v. Boyd*, 119 Tex. 182, 26 S.W.2d 905 (1930); *Anchor v. Martin*, 116 Tex. 409, 292 S.W. 877 (1927); *Cortimeglia v. Davis*, 116 Tex. 412, 292 S.W. 875 (1927); *Angelina Casualty Co. v. Fisher*, 319 S.W.2d 387 (Tex. Civ. App. — Beaumont 1958, no writ); *Union City Transfer v. Kenna*, 210 S.W.2d 431 (Tex. Civ. App. — Beaumont 1948, no writ).

[5] *See, Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916 (Tex. 1985), in which the court cites precedent for the rule without discussing any reason for the rule. *Johnson* is internally inconsistent since it adheres to the rule severely limiting the authority of appellate courts to set aside new trial orders, but at the same time recognizes that mandamus should issue when a trial court clearly abuses its discretion.

appellate courts blindly cling to their self-imposed restrictions on the scope of review of new trial orders.

IV. THE TEXAS RULE PRECLUDING REVIEW OF NEW TRIAL ORDERS IS UNCONSTITUTIONAL.

A. Defendants Have the Right to Trial by Jury Under the Texas Constitution.

The current Texas rule precluding review of an order granting a new trial effectively permits a trial court to set aside an errorless jury verdict for any reason or no reason at all in derogation of the prevailing party's constitutional right to trial by jury. TEX. CONST. art. I, § 15. A prevailing litigant has a protected interest in the jury's verdict on the merits. Giving trial judges *carte blanche* to set aside jury verdicts violates a litigant's constitutional right to a jury trial.

B. Defendants Are Entitled to Due Process of Law and Equal Protection Under the U.S. and Texas Constitutions.

A rule requiring a party to abide by an arbitrary ruling, violative of its constitutional right to trial by jury, offends due process. A fundamental component of the due process guarantees in the Texas and United States Constitution is that a party be allowed to have the merits of his case "fairly judged." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982). U.S. CONST. amend. V, XIV; TEX. CONST. art. I, §§ 3, 19. The failure to offer litigants *any* appellate or mandamus review of an order arbitrarily granting a new trial violates due process and denies litigants meaningful access to the courts. The Texas judicial system provides some kind of review for every other type of trial court order, and the peculiar exemption of new trial orders from any review contravenes the due process and equal protection clauses of the United States and Texas Constitutions.

C. Defendants Have the Right to Appellate Review Under the Texas Constitution.

The Texas Constitution guarantees litigants the right to obtain review of a trial court's decisions by an appellate court. TEX. CONST. art. I, §§ 13, 19. "A dissatisfied litigant . . . has the constitutional right to have his case reviewed by the Court of Civil Appeals." *Stroud v. Ward*, 36 S.W.2d 590, 591 (Tex. Civ. App. — Waco 1931, no writ). The right to appellate review protects a party's right to due process of law and preserves the integrity of the judiciary by guarding against the arbitrary exercise of judicial power. Rule 81(b) of the Texas Rules of Appellate Procedure serves to implement the constitutional right to appellate review by making any error that "probably prevented the appellant from making a proper presentation of the case to the appellate court" reversible error.

D. Defendants Are Entitled to Protection From Arbitrary Retrial Under the Double Jeopardy Clauses of the U.S. and Texas Constitutions.

The trial court's order in this case violates the double jeopardy clause because it potentially subjects Defendants to multiple or successive punitive damage awards for the same course of conduct when a jury has already absolved Defendants of any liability. U.S. CONST. amend. V; TEX. CONST. art. I, § 14. Because punitive damage awards are designed to be penal in nature, *see Lunsford v. Morris*, 746 S.W.2d 471 (Tex. 1988), Defendants will be subject to double jeopardy by an arbitrary retrial. Therefore, under the double jeopardy clauses of the United States and Texas Constitutions, Defendants are entitled to appellate review of the trial court's decision to grant a new trial.

V. THE TRIAL COURT CLEARLY ABUSED ITS DISCRETION IN GRANTING A NEW TRIAL.

If the trial court's order granting a new trial in this case is subject to review, that order should be set aside because it constituted a clear abuse of discretion.

A. The Trial Court Had No Authority to Grant a New Trial for Avala.

Plaintiffs elected to submit liability issues only as to Intershop's negligence. No issues were submitted as to Avala. An independent ground of recovery which is not submitted or requested is waived. TEX. R. CIV. P. 279. Thus, the trial court plainly erred in granting a new trial as to the entire cause of action. The take-nothing judgment of July 5, 1991 is clearly proper as to Avala.

B. The Trial Court Acted On An Improper Motion.

Plaintiffs' Motion for New Trial did not specify the particular way the evidence was allegedly insufficient to support the verdict. A motion for new trial based on insufficiency of the evidence must distinctly specify the particulars in which the evidence is claimed to be insufficient. *White v. Wadlington*, 78 Tex. 159, 14 S.W. 296 (1890). Plaintiffs' motion merely directed global allegations to a broad form negligence question. The trial court clearly abused its discretion by ruling on an improper motion.

C. The Trial Court's Order Violated Defendants' Constitutional Rights.

By granting a new trial when, as discussed above, the evidence was sufficient to support the jury's verdict, the trial court substituted its view of the evidence for that of the jury and violated Defendants' constitutional right to trial by jury, to access to the courts, to due process of law, to equal protection, and to appellate review. U.S. CONST. amend. V, XIV; TEX. CONST. art. I, §§ 3, 13, 15, 19; TEX. R. APP. P.

81(b). *See supra* at pp. 19-21. Furthermore, by arbitrarily ordering a retrial after a jury had absolved Defendants of liability, the trial court twice placed Defendants in jeopardy of being subjected to punitive damages in violation of the double jeopardy clauses of the United States and Texas Constitutions. U.S. CONST. amend. V; TEX. CONST. art. I, § 14. *See supra* at p. 21.

D. The Trial Court Set Aside the Jury Verdict Without Detailing the Evidence.

The trial court overturned the jury's verdict in this case in a three-line order that merely recited that Plaintiffs' Motion for New Trial (the sole basis for which was that the verdict was against the great weight and preponderance of the evidence) had been heard and granted. A trial court has no greater right to review the factual sufficiency of evidence than the courts of appeals, and a court of appeals cannot set aside a jury finding without first engaging in a detailed review of the evidence. *Larson*, 730 S.W.2d at 641; *Herbert*, 754 S.W.2d at 144; *Pool*, 715 S.W.2d at 635. When granting a new trial on factual sufficiency grounds, a court must detail the evidence relevant to the issue and clearly state why the jury's finding is factually insufficient or is so against the great weight and preponderance as to be manifestly unjust, why it shocks the conscience, or why it clearly demonstrates bias. *Cropper v. Caterpillar Tractor Co.*, 754 S.W.2d 646, 652 (Tex. 1988); *Pool*, 715 S.W.2d at 635.

Thus, before setting aside the verdict returned by the jury for factual insufficiency, the trial court was constitutionally required to enter findings detailing the evidence both in support of and against the verdict and explaining why the verdict was against the great weight and preponderance of

the evidence.[6] *Pool*, 715 S.W.2d at 635. Defendants provided the trial court with a complete Statement of Facts from the entire trial and specifically pointed out the need for findings concerning the evidence. (Ex. 8.) By signing an order granting Plaintiffs a new trial without any explanation, the trial court violated its constitutional duty to make findings that reflected the "mental process" by which it reached its conclusion concerning the insufficiency of the evidence. *Id.*

CONCLUSION

The verdict returned by the jury in this case was the result of a fair trial and was amply supported by the evidence. Plaintiffs were represented by able trial counsel and had a full opportunity to present their case to the jury. They lost. They should not be allowed to retry their case simply because the trial judge believes that they should have won. Mandamus should issue to correct the trial court's clear abuse of discretion in granting Plaintiffs' Motion for New Trial.

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[6] Evidentiary hearings and fact findings by the trial court are required in other cases where constitutional issues are involved. For example, the trial court is required to file findings of fact and conclusions of law in *Batson* cases when peremptory challenges are used to exclude jurors on account of race. *See Batson v. Kentucky*, 476 U.S. 79 (1986) (criminal case); *Keeton v. State*, 724 S.W.2d 58 (Tex. Crim. App. 1987) (Texas criminal case); *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, _____ U.S. _____ (1991) (applying *Batson* rule to civil cases); *Powers v. Palacios*, 34 Tex. Sup. Ct. J. 651 (June 12, 1991) (per curiam) (Texas civil case). The new bonding rules also contemplate hearings and findings by the court. *See* TEX. R. APP. P. 49(b).

EXHIBITS

Certified or sworn copies of the following documents have been bound under separate cover, are being submitted to the Court along with this Petition, and are incorporated by reference as if fully set forth herein:

DESCRIPTION	EXHIBIT NO.
Plaintiffs' Second Amended Original Petition	1
Defendants' Answer to Plaintiffs' Second Amended Original Petition	2
Jury Charge/Verdict	3
Final Judgment	4
Plaintiffs' Motion for New Trial	5
Defendants' Response to Plaintiffs' Motion for New Trial	6
Order Granting Motion for New Trial	7
Defendants' Motion For Reconsideration	8
Order Denying Motion for Reconsideration	9
Tables Concerning Reviewability of New Trial Orders in All 50 States	10
Statement of Facts from Trial (bound in 7 separate volumes)	11
Statement of Facts from Hearing on Motion for Reconsideration (bound in a separate volume)	12

PRAYER

WHEREFORE, PREMISES CONSIDERED, Relators pray that this Court grant this Petition for Writ of Mandamus, issue a writ of mandamus directing Respondent to set aside his order granting a new trial and to render judgment upon the verdict. Alternatively, and without waiving the foregoing, Relators pray that this Court issue a writ of mandamus directing Respondent to issue a new trial order detailing the evidence and showing how the verdict was against the great weight and preponderance of the evidence, and grant Relators such other and further relief to which they are justly entitled.

Respectfully submitted,

VINSON & ELKINS

By /s/ PENELOPE E. NICHOLSON

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Attorneys for Relators, AVALA OF TEXAS, INC. d/b/a PLYMOUTH PARK SHOPPING CENTER, and INTERSHOP REAL ESTATE SERVICES, INC., f/k/a HFA MANAGEMENT USA CO.

AFFIDAVIT OF LOUIS E. McCARTER IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

STATE OF TEXAS §
§
COUNTY OF HARRIS §

Before me, the undersigned authority, on this day personally appeared Louis E. McCarter, known to me to be the individual whose name is subscribed to this Affidavit, who being duly sworn by me, did depose and state as follows:

1. My name is Louis E. McCarter. I am over 21 years of age, have never been convicted of a crime involving moral turpitude, and am in all ways competent to make this Affidavit. I have personal knowledge of all of the facts contained in this Affidavit and all of such facts are true and correct.

2. I am an attorney with the law firm of Vinson & Elkins and am representing Relators Avala of Texas, Inc., d/b/a The Avala Group and d/b/a Plymouth Park Shopping Center and Intershop Real Estate Services, Inc., f/k/a HFA Management USA Company in this proceeding.

3. I have read the foregoing Petition for Writ of Mandamus and have personal knowledge of all of the facts set forth in that Petition. All such facts are true and correct.

FURTHER AFFIANT SAYETH NOT.

/s/ LOUIS E. MCCARTER
Louis E. McCarter

SUBSCRIBED and SWORN TO before me on this the 9th day of September, 1991, to which I certify my hand and seal of office.

/s/ TERESA FITZMORRIS
Notary Public In and For
The State of Texas

My Commission Expires:
August 1, 1994

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served upon Respondent and counsel of record, listed below, on this the 9th day of September, 1991, by hand-delivery and/or certified mail, return receipt requested.

Honorable David West
269th Judicial District Court
of Harris County, Texas
301 Fannin Street
Houston, Texas 77002

Mr. Ronald D. Krist
Krist, Gunn, Weller, Neumann
17555 El Camino Real
Houston, Texas 77058

Mr. Jimmy G. Williamson
300 Fannin, Suite 300
Houston, Texas 77002

/s/ PENELOPE E. NICHOLSON

APPENDIX L

No. 01-91-808-CV

IN THE
COURT OF APPEALS
for the
FIRST DISTRICT OF TEXAS
HOUSTON, TEXAS

AVALA OF TEXAS, INC. d/b/a THE AVALA GROUP
AND d/b/a PLYMOUTH PARK SHOPPING CENTER AND
INTERSHOP REAL ESTATE SERVICES, INC.
f/k/a HFA MANAGEMENT USA CO.,
Relators

v.

THE HONORABLE DAVID WEST
JUDGE OF THE 269TH DISTRICT COURT
HARRIS COUNTY, TEXAS,
Respondent.

ANSWER TO PETITION FOR WRIT OF MANDAMUS

TO THE HONORABLE JUSTICES OF SAID COURT:

COME NOW Gregorio Garcia, Individually and as Surviving Husband of Patricia Wilson Garcia and As Next Friend of Alicia Nicole Garcia, and Robert G. Wilson and Teresa S. Wilson, Individually and As Surviving Parents of Patricia Wilson Garcia ("Plaintiffs"), the real parties in interest, and file this original Answer in response to the Petition for Writ of Mandamus filed by Avala and Intershop, Relators, and for answer would show:

PARTIES

The Petition accurately identifies the Respondent and the real parties in interest as required by Rule 121 of the Texas Rules of Appellate Procedure.

FACTS[1]

Plaintiffs filed suit against Relators (the owner and manager of the Plymouth Park Shopping Center) to recover damages for the death of Patricia Wilson Garcia who was murdered as she was attempting to buy stamps at a self-service postal island located in the parking lot of the center. After a jury trial resulted in a verdict favorable to Relators (Ex. 3), Respondent entered judgment on the verdict in Relators' favor (Ex. 4). On Plaintiffs' motion (Ex. 5), the Court entered an order granting a new trial (Ex. 7). Although the order specified no reason, Respondent indicated during the hearing on Relators' motion for reconsideration that the new trial was granted in the interest of justice (Ex. 12, at 8). Relators now seek leave to file a petition for writ of mandamus to review Respondent's order.

RELIEF SOUGHT

Relators ask this Court to overturn 80 years of Supreme Court precedent to the effect that orders granting new trials are not reviewable by mandamus. They fail to state the basis for the relief; similarly, they fail to state the compelling circumstances which establish the necessity for the writ.

QUESTIONS PRESENTED

1. Should this Court abandon the long-standing rule that a trial court order granting a new trial is not reviewable by

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[1] As the Petition contains factual material not called for by Rule 121(a)(2)(C) of the Rules of Appellate Procedure, Plaintiffs supply the required statement.

mandamus except in two circumstances not presented on this record?[2]

2. Whether the long-standing rule that trial court orders granting a new trial are not reviewable by writ of mandamus violates either the Texas or U.S. Constitution?[3]

BRIEF OF THE ARGUMENT

1. There is no reason to overturn 80 years of Supreme Court precedent that trial court orders granting new trials are not reviewable by mandamus.

Relators acknowledge that mandamus has not been available to review trial court orders granting new trials since the decision in *Wright v. Swayne*, 140 S.W. 221 (Tex. 1911). They also acknowledge that the rule has been reaffirmed as recently as 1985 in *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916 (Tex. 1985), a security case in which the plaintiff sought mandamus. This concession alone would justify overruling the motion for leave to file in accordance with the provisions of Rule 121(c) of the Rules of Appellate Procedure.[4]

---

[2] A trial court's order granting a new trial is subject to review by mandamus if the trial court's order is wholly void or is based on a perceived conflict in jury answers. *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 918 (Tex. 1985); *see* O'Connor, Texas Rules § 7.2, at 607 (1991).

[3] The related question of the constitutionality of the decision of the Supreme Court of Texas that an order granting a new trial is not reviewable on appeal from the judgment entered after the second trial, *Cummins v. Paisan Const. Co.*, 682 S.W.2d 235, 236 (Tex. 1984), cannot conceivably be before this Court by way of mandamus.

[4] This is not to suggest that this Court lacks jurisdiction to grant the writ. *Compare* Tex. Gov't Code Ann. § 22.221(b) (Vernon 1988) *with* Tex. Gov't Code Ann. § 22.002(a) (Vernon 1988).

Instead, Relators argue that the Court should overturn long-established Supreme Court precedent[5] because the rule, in its view, ". . . should be discarded as a (*sic*) historical anomaly (Pet. 16-18)," particularly in light of recent trends which have expanded the availability of mandamus to review discovery orders (Pet. 14-16). These arguments will not withstand analysis.

The duty of a trial judge to grant a new trial in the interest of justice is deeply rooted in our jurisprudence, as our Supreme Court observed nearly a hundred years ago in *Choate v. San Antonio & A.P.Ry. Co.*, 37 S.W. 319 (Tex. 1896):

> Although there may be sufficient evidence in a case to require the court to submit it to the jury, yet if the verdict rendered thereon is against the preponderance of the evidence, to that degree which shows that manifest injustice has been done, the trial court may and should grant a new trial. The judge should not invade the province of the jury and take from it the decision of a question which properly belongs to it. Neither should he abdicate the functions of his office, and permit the prerogatives of the jury to be perverted to the accomplishment of wrong.

As the Supreme Court observed recently in *Cropper v. Caterpillar Tractor Co.*, 754 S.W.2d 646, 652 (Tex. 1988), in dealing with the closely related power of appellate courts to review fact questions, "[t]he right of trial by jury and appellate court review of fact questions have peacefully co-existed for almost 150 years, and are thoroughly rooted in our constitution and judicial system."

Relators will respond that they do not really quarrel with the proposition that trial courts should have the power to

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[5] Relators fail to explain where this Court is to find the authority to overrule the Supreme Court's clear and unambiguous decisions.

grant new trials; however, they contend that a trial court order granting a new trial should be reviewable. There are two simple answers to this contention. First, an appellate court's action in ordering a new trial on similar grounds is not reviewable. Tex. Const. art. V, § 6; *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 634 (Tex. 1986). *See* Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 Tex. L. Rev. 361, 368 (1960). Second, considerations of judicial economy mitigate against review of orders granting new trials. It is one thing to ask an appellate court to review a trial record during the course of disposing of an appeal from a final judgment. It is quite another to ask an already overburdened appellate court to look at a lengthy trial record for the sole purpose of determining whether an interlocutory order of a trial court granting a new trial was proper and then ask it to review essentially the same record again on appeal of the verdict following a retrial.

In a sense, Relators' argument based on the expanded use of mandamus in discovery contexts proves too much. The facts are rarely in dispute in discovery contexts. Moreover, appellate courts, already overburdened with mandamus proceedings arising out of discovery orders, arguably do not have time to review orders granting new trials.

2. Neither the Texas nor the U.S. Constitution requires that Relators be entitled to review an order granting a new trial by writ of mandamus.

a. Right to trial by jury.[6]

It is well established that the action of a court of appeals setting aside a jury finding as against the great weight and preponderance of the evidence is not violative of Tex. Const.

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[6] As the Seventh Amendment right to jury trial has not been made applicable to the states, *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211 (1916), this discussion is confined to decisions under the Texas Constitution.

art. I, § 15. *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 634 (Tex. 1986). If the action of an appellate court setting aside a jury finding on the basis of a written record does not violate the right to trial by jury, then action of a trial judge who has had the benefit of observing the conduct and demeanor of the witnesses and parties and who is in a much better position to evaluate the extent to which an injustice may have been done, *cf. Larson v. Cactus Utility Co.*, 730 S.W.2d 640, 642 (Tex. 1987) (Hill, C.J., dissenting), presents no constitutional question. Since the decision of a court of appeals is not reviewable, Tex. Const. art. V., § 6, it is less than clear why the action of the trial judge need be reviewable, much less, by way of mandamus.

b. Relators have not been denied due process or equal protection.

Relators cite no case, and Plaintiffs are aware of none, holding that the due process clauses of the Texas or U.S. Constitution require that interlocutory orders in general or orders granting new trials in particular be reviewable by way of mandamus. Although the related questions of non-reviewability under Tex. Civ. Prac. & Rem. Code §51.012 (Vernon 1987) or on appeal of a final judgment after the second trial, *Cummins, supra,* are not before the Court, it is also worth noting that Relators cite no authority indicating that due process requires that such an interlocutory order be appealable *at some state.*

The failure of Relators to brief the federal decisions is, of course, understandable. A similar order of a federal trial court granting a new trial is not reviewable by either mandamus or appeal. *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33 (1980) (mandamus not available); *Eaton v. National*

Steel Products Co., 624 F.2d 863 (9th Cir. 1980) (order not appealable).[7]

Simply put, the Texas scheme jealously protects the inherent power of a trial judge to grant a new trial in the interest of justice. Instead of making the order reviewable, it protects the litigants by limiting the number of new trials that can be granted in the same cause because of insufficiency or weight of the evidence. Tex.R.Civ.P. 326. Accordingly, the state's interest in fashioning its own rules of procedure is paramount to any discernable federal interest, except perhaps an interest in protecting the individual from state action that is wholly arbitrary or irrational, *cf. Martinez v. California*, 444 U.S. 277, 282 (1980).

This brings to the equal protection analysis. There is no equal protection problem because litigants who might wish to complain of an order granting a new trial are treated alike; all are denied review. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 438-39 (1982) (Blackmun, J., concurring).

c. Jeopardy is not an issue in a civil case.

Relators' jeopardy claim is a classic case of a "federal question" so absolutely devoid of merit as to be frivolous. *Equitable Life Assurance Society v. Brown*, 187 U.S. 308

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[7] Although the *Daiflon* result is bottomed in part on the availability of review on appeal from the judgment following the second trial, the case by no means stands for the proposition that even federal litigants are constitutionally entitled to review *(at some stage)* of every interlocutory order. Even if that were the law, it would not make mandamus available. *See State v. Walker*, 679 S.W.2d 484, 485 (Tex. 1984) (mandamus will lie only to correct abuse of discretion or violation of clear duty *and* when there is no other adequate remedy at law).

(1902). Jeopardy provides three related protections in *criminal* cases:

> It protects against a second prosecution for the same events after acquittal. It protects against a second prosecution for the same events after conviction. And it protects against multiple punishments for the same event. *North Carolina v. Pierce*, 395 U.S. 711, 717 (1969).

Even in criminal cases a defendant may be retried after reversal because of errors at the trial. *United States v. Tateo*, 377 U.S. 463, 473 (1964) (Goldberg, J., dissenting). Relators' claim of jeopardy in a civil case requires no further discussion.

d. Denial of mandamus is not equivalent to denial of the right to an appeal.

It is undisputed that Relators will be entitled to appeal any judgment which might be entered against them following the second trial. Although they will not be entitled to review the order granting a new trial under the reasoning of *Cummins*, *supra*, any complaint properly preserved in the second trial clearly will be before the appellate court for review.[8]

CONCLUSION

Respondent, an experienced trial judge, granted a new trial in the interest of justice (Ex. 12, at 8, 17). As the order is not reviewable by mandamus, the motion for leave to file should be denied.[9]

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[8] At that time they will be free to assert their position that Plaintiffs waived their right to recovery against Avala (Pet. 21). Given the fact that the undisputed evidence in the case establishes that Intershop was acting as the agent of Avala (S.F. 836), that effort is likely to be unsuccessful. Nevertheless, that is for another court on another day.

[9] The argument that the Court acted on an improper motion and failed to detail the evidence in the way in which appellate

EXHIBITS

Although Plaintiffs have no additional exhibits, they observe that this proceeding may be disposed of without reference to Exhibits 10 and 11.

Respectfully submitted,

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713/223-3330

Attorney Ad Litem for Alicia Nicole Garcia

KRIST, GUNN, WELLER
NEUMANN & MORRISON

By: /s/ PERRY O. BARBER, JR.
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State Bar Number 11727000
Kevin D. Krist
State Bar Number 11726900
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State Bar Number 18488000

17555 El Camino Real
Houston, Texas 77058-3097
713/283-8500

Attorneys for Plaintiffs

---

courts are required to do (Pet. 22-23) is patently frivolous. The trial judge can grant a new trial on his own motion, Tex.R.Civ.P. 320, and even *Larson*, *supra*, stops short of requiring the trial judge to detail the evidence in the process of ordering a new trial conditioned on remittitur. Moreover, there is a good reason for the requirement that appellate courts detail the evidence. They, unlike the trial court, were not *there* when the case was tried.

AFFIDAVIT OF KEVIN D. KRIST

STATE OF TEXAS §
§
COUNTY OF HARRIS §

BEFORE ME, the undersigned authority on this day personally appeared KEVIN D. KRIST, known to me to be the individual whose name is subscribed to this affidavit, who being duly sworn by me did depose and state as follows:

1. My name is KEVIN D. KRIST. I am over 21 years of age, have never been convicted of a crime involving moral turpitude, and am in all ways competent to make this affidavit.

2. I am an attorney with the law firm of Krist, Gunn, Weller, Neumann and Morrison and am representing Plaintiffs in this proceeding.

3. I have read the foregoing Answer to Petition for Writ of Mandamus and have personal knowledge of all the facts set forth in that Petition. All such facts are true and correct.

/s/ KEVIN D. KRIST
Kevin D. Krist, *Affiant*

SUBSCRIBED AND SWORN TO BEFORE me on the 16th day of September, 1991, to certify which witness my hand and official seal of office.

/s/ TERRI W. JONES
Notary Public - State of Texas

CERTIFICATE OF SERVICE

I, Perry O. Barber Jr., hereby certify that on the 16th day of September, 1991, a true and correct copy of the foregoing instrument was furnished to each attorney of record in this cause by messenger.

/s/ PERRY O. BARBER, JR.

Perry O. Barber Jr.

APPENDIX M

IN THE COURT OF APPEALS
for the
FIRST DISTRICT OF TEXAS

NO. 01-91-00808-CV

AVALA OF TEXAS, INC., d/b/a THE AVALA GROUP AND d/b/a PLYMOUTH PARK SHOPPING CENTER AND INTERSHOP REAL ESTATE SERVICES, INC., f/k/a HFA MANAGEMENT USA CO.,

Relators

V.

THE HONORABLE DAVID WEST, JUDGE OF THE 269TH DISTRICT COURT OF HARRIS COUNTY, TEXAS,

Respondent

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS

TO THE HONORABLE JUSTICES OF THE COURT OF APPEALS:

COME NOW Relators, Avala of Texas, Inc. d/b/a The Avala Group and d/b/a Plymouth Park Shopping Center (hereafter "Avala") and Intershop Real Estate Services, Inc., f/k/a HFA Management USA Co. (hereafter "Intershop"), complaining of the Respondent, the Honorable David West, Judge of the 269th Judicial District Court of Harris County, Texas, and move this Court to grant leave to file their

Petition for Writ of Mandamus. In support of this Motion, Relators would respectfully show the following:

I.

The Petition for Writ of Mandamus and the Exhibits to the Petition for Writ of Mandamus are attached and incorporated by reference as if fully set forth herein.

II.

Relators have tendered the cash deposit for costs as required by the Texas Rules of Appellate Procedure.

III.

Respondent clearly abused his discretion in granting a new trial to the Plaintiffs and Real Parties in Interest, Gregorio Garcia (Individually and as Surviving Husband of Patricia Wilson Garcia and as Next Friend of Alicia Garcia) and Robert G. Wilson and Theresa S. Wilson (Individually and as Surviving Parents of Patricia Wilson Garcia). The granting of Plaintiffs' Motion for New Trial constituted a clear abuse of discretion for the following reasons:

1. Plaintiffs waived any claims against Avala by failing to request any jury questions concerning Avala's liability. Thus, Plaintiffs are not entitled to re-try their claims against Avala, and the judgment should be final as to Avala.

2. The sole basis for Plaintiffs' Motion for New Trial was Plaintiffs' contention that the jury's verdict was against the great weight and preponderance of the evidence. Plaintiffs' motion did not, however, distinctly specify the particulars in which the evidence was allegedly insufficient to support the verdict. Therefore, the trial court acted on an improper motion.

3. Respondent failed to detail the evidence both in support of and contrary to the jury's finding before granting a new trial based on insufficiency of the evidence as required by the Texas Constitution and the decisions of the Texas Supreme Court.

4. The evidence was clearly sufficient to support the jury's verdict. The verdict was plainly not against the great weight and overwhelming preponderance of the evidence. In granting Plaintiffs' Motion for New Trial, Respondent substituted his view of the evidence for that of the jury and violated Defendants' state and federal constitutional rights to a trial by jury, to access to the courts, to due process of law, to equal protection, and to appellate review.

WHEREFORE, PREMISES CONSIDERED, Relators respectfully request that this Court grant leave to file the attached Petition for Writ of Mandamus, that the same be set for hearing with notice to all interested parties, and that this Court issue a writ of mandamus directing Respondent to set aside his order granting a new trial and to render judgment on the verdict. Without waiving the foregoing, Relators alternatively pray that this Court order Respondent to set forth in his order granting a new trial, in detail, the evidence both in support of and contrary to the jury's finding that supports Respondent's conclusion that the jury's verdict is against the great weight and preponderance of the evidence. Finally, Relators request that they be granted such

other and further relief to which they may show themselves justly entitled.

Respectfully submitted,

VINSON & ELKINS

By /s/ PENELOPE E. NICHOLSON

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Attorneys For Relators,
AVALA OF TEXAS, INC.
d/b/a PLYMOUTH PARK
SHOPPING CENTER, and
INTERSHOP REAL ESTATE
SERVICES, INC., f/k/a HFA
MANAGEMENT USA CO.

VERIFICATION

STATE OF TEXAS §
§
COUNTY OF HARRIS §

Before me, the undersigned authority, on this day personally appeared Louis E. McCarter, who being duly sworn by me on his oath that he has read the above and foregoing and that the statements contained therein are true and correct.

/s/ LOUIS E. MCCARTER
Louis E. McCarter

SUBSCRIBED and SWORN TO before me on this the 9th day of September, 1991, to which I certify my hand and seal of office.

/s/ TERESA FITZMORRIS
Notary Public In and For
The State of Texas

My Commission Expires:
8-1-94

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served upon Respondent and counsel of record, listed below, on this the 9th day of September, 1991, by hand-delivery and/or certified mail, return receipt requested.

Honorable David West
269th Judicial District Court
of Harris County, Texas
301 Fannin Street
Houston, Texas 77002

Mr. Ronald D. Krist
Krist, Gunn, Weller,
Neumann
17555 El Camino Real
Houston, Texas 77058

Mr. Jimmy G. Williamson
300 Fannin, Suite 300
Houston, Texas 77002

/s/ PENELOPE E. NICHOLSON

APPENDIX N

THE SUPREME COURT OF TEXAS

NO. D-1540

AVALA OF TEXAS, INC. d/b/a THE AVALA GROUP
AND d/b/a PLYMOUTH PARK SHOPPING CENTER

AND

INTERSHOP REAL ESTATE SERVICES, INC.,
f/k/a HFA MANAGEMENT USA CO.,
Relators

V.

THE HONORABLE DAVID WEST
JUDGE OF THE 269TH DISTRICT COURT
HARRIS COUNTY, TEXAS

AND

THE HONORABLE FIRST COURT OF APPEALS,
Respondents

PETITION FOR WRIT OF MANDAMUS

TO THE HONORABLE SUPREME COURT
OF TEXAS:

COME NOW Relator Avala of Texas, Inc. d/b/a The Avala Group and d/b/a Plymouth Park Shopping Center and Relator Intershop Real Estate Services, Inc., f/k/a HFA Management USA Co. complaining of the Honorable David West, Judge of the 269th District Court of Harris County, Texas, and also complaining of the Honorable First Court of Appeals, and file this their Petition for Writ of Mandamus in which Relators ask this Court to issue a Writ of Mandamus directing Judge West to set aside his order granting a new

trial, and alternatively ask this Court to issue a Writ of Mandamus directing the First Court of Appeals[1] to consider and rule on the complaints made by Relators in their Petition in connection with Judge West's order granting a new trial.

JURISDICTION

The Texas Supreme Court has jurisdiction to grant Relators' Petition for Writ of Mandamus pursuant to TEX. GOV'T CODE ANN. § 22.002(a) (Vernon 1988). Relators presented their Petition to the First Court of Appeals on September 9, 1991. (Ex. 13-15.) That court overruled Relators' Motion for Leave to File Petition for Writ of Mandamus on September 16, 1991. (Ex. 16.) Thus, Relators have satisfied the requirements of TEX. R. APP. P. 121(a)(1).

PARTIES

Relators are Avala of Texas, Inc., d/b/a The Avala Group and d/b/a Plymouth Park Shopping Center ("Avala") and Intershop Real Estate Services, Inc., f/k/a HFA Management USA Company ("Intershop"), the Defendants in the underlying lawsuit out of which this mandamus proceeding

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[1] The primary relief requested by Relators in this Petition is for this Court to issue a writ of mandamus directing the trial court to set aside its order granting a new trial and to enter judgment in accordance with the verdict returned by the jury. *See infra* at pp. 27-28. Relators have, however, named the First Court of Appeals as a Respondent in the event that this Court decides that the Court of Appeals is the appropriate tribunal to determine whether Judge West clearly abused his discretion in granting a new trial on the ground that the verdict returned by the jury was against the great weight and preponderance of the evidence. If this Court decides that the Court of Appeals is the proper tribunal to make that determination, then Relators are asking the Court to direct the First Court of Appeals to review the complaints concerning the new trial order raised by Relators in their Petition. *See infra* at pp. 27-28.

arose. The underlying lawsuit is styled *Gregorio Garcia, Individually and as Surviving Husband of Patricia Wilson Garcia and as Next Friend of Alicia Nicole Garcia, and Robert G. Wilson and Theresa S. Wilson, Individually and as Surviving Parents of Patricia Wilson Garcia v. Avala of Texas, Inc., d/b/a the Avala Group and d/b/a Plymouth Park Shopping Center, Intershop HFA Management USA Co., and Intershop Real Estate Services, Inc., f/k/a Intershop HFA Management USA Co.*, No. 90-13234, in the 269th Judicial District Court of Harris County, Texas. Relators are represented by Louis E. McCarter, Marie R. Yeates, Penelope E. Nicholson, and Phillip B. Dye, Jr. of the law firm of Vinson & Elkins, 1001 Fannin Street, 3300 First City Tower, Houston, Texas 77002.

Respondents are the Honorable David West, Judge of the 269th Judicial District Court of Harris County, Texas, and the Honorable First Court of Appeals. The address for Judge West is Harris County Courthouse, 301 Fannin Street, Houston, Texas 77002. The address for the First Court of Appeals is 1307 San Jacinto Street, Houston, Texas 77002. The Justices on the Panel of the First Court of Appeals that denied Petitioners' Motion for Leave to File Petition for Writ of Mandamus were the Honorable F. Lee Duggan, Jr., the Honorable Margaret Garner Mirabal, and the Honorable Davie L. Wilson. The Clerk for the First Court of Appeals is the Honorable Kathryn Cox.

The Real Parties in Interest are Gregorio Garcia (Individually and as Surviving Husband of Patricia Wilson Garcia and as Next Friend of Alicia Nicole Garcia) and Robert G. Wilson and Theresa S. Wilson (Individually and as Surviving Parents of Patricia Wilson Garcia), the Plaintiffs in the underlying lawsuit out of which this mandamus proceeding arose. Plaintiffs are represented by Ronald D. Krist and Kevin D. Krist of the law firm of Krist, Gunn, Weller,

Neumann & Morrison, 17555 El Camino Real, Houston, Texas 77058. The attorney ad litem for minor Plaintiff Alicia Nicole Garcia is Jimmy G. Williamson of Jimmy G. Williamson, P.C., 300 Fannin, Suite 300, Houston, Texas 77002.

INTRODUCTION

Through this Petition for Writ of Mandamus, Relators seek to challenge the unjust and unconstitutional rule that shields a trial judge's order granting a new trial from any review whatsoever unless the order is wholly void or expressly based on a perceived conflict in jury answers. The rule makes a mockery of the jury system by effectively allowing trial courts to toss out errorless jury verdicts for no reason at all. A party who has spent tens of thousands of dollars on one trial and has fairly won a jury verdict should not have to face a retrial based on a whim of the trial judge.

The present case illustrates the injustice caused by the rule exempting new trial orders from appellate review. After a hard fought, sharply contested trial that lasted seven days, the jury returned a verdict in Defendants' favor. Although there was ample evidence in the record to support the jury's verdict, Plaintiffs moved for a new trial on the sole ground that the verdict was against the great weight and overwhelming preponderance of the evidence. To Defendants' amazement, the trial court granted Plaintiffs' motion. The judge apparently believed that the jury reached the wrong result and substituted his view of the evidence for that of the jury. As the Statement of Facts from the trial filed along with this Petition demonstrates, the jury's verdict was *not* against the great weight and preponderance of the evidence.[2] The clear

[2] Relators have filed the Statement of Facts from the trial as Exhibit 11 to this Petition. The Statement of Facts includes a transcription of the entire trial, but does not include copies of

abuse of discretion committed by the trial judge in granting Plaintiffs' Motion for New Trial should not be a wrong without a remedy. Defendants should not be subjected to a second trial merely because the trial judge disagreed with the verdict returned by the jury in the first trial. This Court has the power to issue a writ of mandamus directing the trial court to set aside its order granting a new trial and should do so. The facts of this case demand relief.

Patricia Wilson Garcia was brutally murdered as she was apparently attempting to buy stamps at a self-service postal island located in the parking lot of a shopping center. The police never caught her attacker. Her husband, daughter, and parents sued Avala (the owner of the shopping center) and Intershop (the manager of the shopping center) for negligence claiming that inadequate security was responsible for Mrs. Garcia's death. (Ex. 1.) During the seven-day trial, Plaintiffs presented evidence criticizing security at the shopping center where the murder occurred, while Defendants challenged Plaintiffs' evidence and introduced their own evidence that the murder was unforeseeable, that Defendants acted reasonably under the circumstances, and that no reasonable extra security measures would have prevented the attack. (Ex. 11.) After the parties rested, Plaintiffs elected not to submit any questions to the jury concerning the liability of Avala (the shopping center owner), but rather to proceed solely against Intershop (the shopping center manager). The jury returned a verdict absolving Intershop of all liability by answering "No" to Jury Question No. 1, which asked,

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the exhibits introduced at trial because many of those exhibits are photographs and other items that cannot readily be copied. Along with this Petition, Relators are filing a motion seeking permission to have the original exhibits transferred to this Court from the trial court so that this Court will have a complete record of the evidence introduced at trial.

> Did the negligence, if any, of Intershop Real Estate Services, Inc. proximately cause the occurrence in question?

(Ex. 3.)

Judge West told the jurors that they had reached the right decision and entered judgment on the basis of their verdict. (Ex. 8-A, 8-D, 8-E, 8-F, 8-I, 8-J[3] and Ex. 4.) Six weeks after the jury returned its verdict, however, he granted Plaintiffs' Motion for New Trial. (Ex. 7.) The *sole basis* for that motion was Plaintiffs' contention that the jury's answer to Question No. 1 was against the great weight and overwhelming preponderance of the evidence. (Ex. 5.) Inexplicably, Judge West also granted a new trial as to Avala, even though Plaintiffs had waived their right to proceed against Avala by failing to request any jury issues concerning Avala's liability. Defendants filed a Motion for Reconsideration, but that motion was denied. (Ex. 8, Ex. 9, and Ex. 12.)

Judge West's decision to grant Plaintiffs' Motion for New Trial was wrong and constituted a clear abuse of discretion. The evidence was hotly contested, with each side presenting evidence in support of its own position as well as challenging the evidence presented by the other side. The jury clearly was entitled to believe Defendants' evidence rather than Plaintiffs' evidence. The finding that Plaintiffs did not carry their burden of proof is amply supported by the record.

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[3] Exhibit 8 is Defendants' Motion for Reconsideration. The motion has a number of exhibits attached to it, including affidavits from the ten jurors who comprised the majority. In their affidavits, six of the jurors made statements to the effect that Judge West told them that they had made the right decision. Whenever a juror affidavit or other attachment to the Motion for Reconsideration is referred to in this Petition, it will be referred to as Ex. 8-A, 8-B, 8-C, etc. *See* footnote 4, *infra*, regarding the admissibility of the affidavits.

In reaching its verdict, the jury considered all of the evidence and took to heart Judge West's admonition not to be swayed by passion or sympathy. (Ex. 8-A - 8-J.) This is a tragic case, and it took courage for the jury to return a verdict based on its objective view of the facts rather than on sympathy for the family of the 22-year old victim who was stabbed to death during her seventh month of pregnancy. Judge West had no right to substitute his judgment for that of the jury, which is clearly what he did.

Although Texas law prohibits a trial court from substituting its view of the evidence for that of the jury, a party aggrieved by a violation of that rule in the granting of a new trial currently has no remedy. An order granting a new trial is not appealable, and the case law suggests that mandamus is not available to set aside new trial orders unless they are wholly void or expressly based on a perceived conflict in jury answers. There is no reason why new trial orders should be exempt from review when every other trial court order is subject to review, either by mandamus or direct appeal. The self-imposed restrictions applied by Texas appellate courts to limit their review of new trial orders are unconstitutional in that they deprive litigants of their right to a jury trial, their right to meaningful access to the courts, their right to due process of law, their right to equal protection, and their right to appellate review. Through this proceeding, Relators ask this Court to cast aside those unconstitutional artificial restrictions and to issue a writ of mandamus directing Judge West to set aside his clearly erroneous order granting a new trial.

Judge West's order constituted a clear abuse of discretion and should be set aside for the following reasons:

(1) Plaintiffs waived any cause of action against Avala by failing to request any jury questions concerning Avala's liability;

(2) Plaintiffs' Motion for New Trial was defective in that it failed to specify the particulars in which the evidence allegedly was insufficient to support the jury verdict;

(3) Judge West failed to detail the evidence both in support of and contrary to the jury's finding before granting a new trial based on insufficiency of the evidence; and

(4) The evidence was clearly sufficient to support the jury's verdict and therefore the order granting a new trial violated Defendants' federal and state constitutional rights to a trial by jury, to access to the courts, to due process of law, to equal protection, and to appellate review.

FACTUAL BACKGROUND

A brief review of the evidence presented at trial shows that there was ample evidence to support the jury's verdict.

The general facts surrounding Mrs. Garcia's murder were undisputed. Mrs. Garcia was stabbed six or seven times in the back of the head and neck between 8:45 and 9:00 p.m. on April 29, 1988. (Ex. 11 at Vol. V, pp. 1146, 1143.) The postal island where Mrs. Garcia was killed was well lighted. (Ex. 11 at Vol. V, pp. 1142, 1140.) Some of the stores in the shopping center had closed, but many remained open. (Ex. 11 at Vol. V, p. 1140; Vol. III, p. 609.) Although no one witnessed the murder, there were still people in the parking lot at the time it occurred. (Ex. 11 at Vol. V, p. 1141; Vol. III, p. 609.)

Defendants called Dr. Charles S. Petty, who was the Chief Medical Examiner and Director of the Criminal Laboratory for Dallas County at the time of the attack, as an expert witness. (Ex. 11 at Vol. III, p. 672.) Dr. Petty's testimony

indicated that Mrs. Garcia was killed quickly. He testified that "one or the other of the fatal wounds was inflicted early on in this affray" and that there were no defensive wounds or other signs of a struggle. (Ex. 11 at Vol. III, pp. 694, 707.) In Dr. Petty's opinion, Mrs. Garcia's murderer "was under some sexual tension" because the nature of the wounds "represent a great deal of sexual energy." (Ex. 11 at Vol. III, p. 692.)

Defendants also called Mr. William Degan as an expert witness on security. Mr. Degan testified that Defendants "acted in a very prudent manner" in implementing their security program. (Ex. 11 at Vol. V, pp. 1130-31.) He also testified that he had reviewed the statistics concerning crime in the shopping center and that those statistics provided no basis for anticipating the kind of violent crime that took Mrs. Garcia's life. (Ex. 11 at Vol. V, p. 1136.) In his words, "such an irrational and brutal crime [was] not foreseeable." (Ex. 11 at Vol. V, p. 1136.) Mr. Degan further testified that the murder was "so vicious and executed so quickly, so irrationally" that he did not think that the presence of roving security personnel in the shopping center would have prevented the crime. (Ex. 11 at Vol. V, pp. 1145-46. *See also* 1214.)

Predictably enough, Plaintiffs' security expert, Mr. Robert Waldhuber, disagreed with Mr. Degan's opinion. Mr. Waldhuber testified to the effect that Defendants' security was inadequate and that such inadequacy was a proximate cause of Mrs. Garcia's vicious murder. In his opinion, Defendants should have employed two unarmed security guards — one to patrol the 77-acre parking lot and one to guard the postal island. (Ex. 11 at Vol. III, pp. 626-627.) Yet even Mr. Waldhuber admitted that unarmed security guards might not have been able to prevent the brutal attack on

Mrs. Garcia. (Ex. 11 at Vol. III, pp. 637-38.) He also admitted that good lighting is a recognized form of security, but that adequate lighting did not prevent Mrs. Garcia's murder. (Ex. 11 at Vol. III, pp. 599, 610-11, 621.) In addition, he agreed that the presence of people generally serves as a deterrent to crime, but did not do so in this case. (Ex. 11 at Vol. III, pp. 604, 612, 621.) Finally, he recognized that the presence of cars passing slowly through the parking lot did not stop the killer. (Ex. 11 at Vol. III, pp. 613-14, 621.)

In sum, the evidence concerning negligence and proximate cause was hotly disputed. The verdict returned by the jury was clearly not against the great weight and preponderance of the evidence. To the contrary, there was ample evidence in the record to support the verdict.

In affidavits submitted to the trial court in connection with Defendants' Motion for Reconsideration, the ten jurors who composed the majority stated that they had carefully considered all of the evidence in reaching their verdict. (Ex. 8-A – 8-J.)[4] A further indication of the jury's thorough analysis of the evidence can be found in the marks that they made on Defendants' Exhibit 3, a map of the shopping center. (Ex. 8-L.) The jury marked the location of the

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[4] Plaintiffs made no objection to the juror affidavits when Defendants tendered them into evidence at the hearing on the Motion for Reconsideration. (Ex. 12, p. 25.) Moreover, the affidavits were admissible because they did not seek to impeach the verdict. *See Shaw v. Greater Houston Transp. Co.*, 791 S.W.2d 204, 210 (Tex. App. — Corpus Christi 1990, no writ) (holding that five juror affidavits were admissible because "relevant" and "helpful" on issue other than to impeach the jury verdict); *Caylat v. Houston E. & W.T. Ry.*, 113 Tex. 131, 252 S.W. 478, 482 (Tex. Comm'n App. 1923, opinion adopted) (receipt of juror affidavits that do not impeach the jury verdict "contravenes no announced principle of public policy"). The affidavits show that the jurors were not subject to any outside influence, but rather decided the case based solely on the evidence.

incidents that Plaintiffs contended should have apprised Defendants of the need for greater security and obviously concluded that since none of the incidents had occurred near the postal island, Defendants could not have foreseen any need to station a security guard at the postal island. In their affidavits, the jurors affirmed that they had decided the case based solely on the evidence and had not considered any outside influence. Although they felt very sorry for Plaintiffs, they believed that the evidence compelled them to reach the verdict that they did.

ARGUMENT AND AUTHORITIES

I. JUDGES MAY NOT SUBSTITUTE THEIR VIEW OF THE EVIDENCE FOR THAT OF THE JURY.

Throughout the history of Texas jurisprudence, the opinions handed down by the courts of this State have consistently "demonstrate[d] respect for jury verdicts." *Herbert v. Herbert*, 754 S.W.2d 141, 144 (Tex. 1988). Indeed, "the sanctity of the right of trial by jury" is embedded in the Texas Constitution. *Texas Farmers Ins. Co. v. McGuire*, 744 S.W.2d 601, 603 (Tex. 1988). Section 15 of article I of the constitution mandates that the right to a jury trial "shall remain inviolate." TEX. CONST. art. I, § 15.

Because of the great deference to jury verdicts required by the Texas Constitution, trial courts have been expressly prohibited from substituting their view of the evidence for that of the jury since at least 1898. In *Choate v. San Antonio & A. P. Ry.*, 91 Tex. 406, 44 S.W. 69 (1898), the Texas Supreme Court wrote, "clearly the trial court cannot set aside the verdict, and substitute its finding." More recently, the supreme court has held, "*no court* is free to substitute its judgment for that of the jury." *Larson v. Cactus Utility Co.*, 730 S.W.2d 640, 641 (Tex. 1987) (emphasis added).

While the Texas Constitution makes the right to trial by jury "inviolate," the constitution also gives courts of appeals the power to review the sufficiency of the evidence to support a jury finding. TEX. CONST. art. V, § 6. *Herbert*, 754 S.W.2d at 143. Several courts have noted that there is a certain tension between the constitutional provision concerning the people's right to a jury determination of disputed facts and the constitutional provision concerning the appellate courts' power to review jury fact findings. *See, e.g., id.* at 142-44; *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 633-36 (Tex. 1986). The courts have resolved that tension by strictly limiting an appellate court's authority to review the fact findings made by a jury. An appellate court may set aside a jury verdict on the ground that the evidence is factually insufficient to support that verdict only after considering all of the evidence and concluding that the verdict is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986). Furthermore, when reversing on insufficiency grounds, an appellate court must "detail the evidence relevant to the issue in consideration and clearly state why the jury's finding is factually insufficient or is so against the great weight and preponderance as to be manifestly unjust; why it shocks the conscience; or clearly demonstrates bias." *Pool*, 715 S.W.2d at 635. The appellate court also must demonstrate how the evidence contrary to the verdict greatly outweighs the evidence in support of the verdict. *Id.*

Like appellate courts, trial courts have the power to set aside jury verdicts on factual sufficiency grounds, but in doing so they are subject to the same standards as appellate courts. *Larson*, 730 S.W.2d at 641. *Hopson v. Gulf Oil Corp.*, 150 Tex. 1, 237 S.W.2d 352, 358 (1951); *Choate*, 44 S.W. at 69. In rejecting an argument that trial courts should have greater latitude than appellate courts in ordering remittitur,

the *Larson* court observed that allowing a trial court to reduce the damages awarded by a jury when the evidence is factually sufficient to support those damages would "rob[] of its vitality the constitutionally mandated right of trial by jury." 730 S.W.2d at 641. The court also noted that giving trial judges broad discretion to order remittitur would permit them to substitute their judgment for that of the jury. *Id.* Reaffirming this State's longstanding commitment to trial by jury, the court concluded, "*Trial courts and courts of appeals should be subject to the same standard for a simple reason: no court is free to substitute its judgment for that of the jury.*" *Id.* (emphasis added).

II. THERE IS CURRENTLY NO WAY TO OBTAIN REVIEW OF A TRIAL COURT'S IMPROPER DECISION TO SUBSTITUTE ITS VIEW OF THE EVIDENCE FOR THAT OF THE JURY IN THE GRANTING OF A NEW TRIAL.

Although Texas law clearly makes trial courts subject to the same standards as appellate courts in setting aside jury verdicts based on factual insufficiency of the evidence, there is currently no way to obtain review of a trial court's improper decision to substitute its view of the evidence for that of the jury in the granting of a new trial. An order granting a new trial is interlocutory and therefore not immediately appealable. *Cf.* TEX. CIV. PRAC. & REM. CODE ANN. § 51.012 (Vernon 1987) (listing the only appealable interlocutory orders). Nor are new trial orders subject to review following the entry of final judgment after a second trial. *Cummins v. Paisan Const. Co.*, 682 S.W.2d 235, 235-36 (Tex. 1984); *Equitable Life Assur. Soc. v. Murdock*, 219 S.W.2d 159, 164 (Tex. Civ. App. — El Paso 1949, writ ref'd n.r.e.). Finally, the courts of this State have declined to use the writ of mandamus to compel trial courts to set aside erroneous orders granting new trials except when the orders

are wholly void or based on a perceived conflict in jury answers. *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 918 (Tex. 1985).

As a practical matter, under the current state of the law, a trial court can order a new trial for any reason — or no reason at all — and its decision will never be subject to even the most minimal scrutiny. As the law now stands, trial courts can toss out jury verdicts on the merest of whims. Every other trial court order is subject to some kind of review, either by appeal or mandamus, and there is simply no basis for treating new trial orders differently from other orders. There is no reason why a trial judge should be allowed to set aside a hard fought, fairly won jury verdict simply because the judge believes the jury reached the wrong result. The refusal of the courts of this State to allow any review of orders granting new trials puts Texas in a minority of only four jurisdictions that preclude review of new trial orders. (Ex. 10.)

III. MANDAMUS SHOULD ISSUE TO CORRECT THE TRIAL COURT'S CLEAR ABUSE OF DISCRETION IN GRANTING A NEW TRIAL.

A. This Court Has Mandamus Jurisdiction to Review Clear Abuses of Discretion By the Trial Court.

The injustice caused by the present rule denying review of new trial orders could be cured by allowing mandamus to be used to correct clear abuses of discretion in the granting of new trials. Texas appellate courts have the authority to issue writs of mandamus to correct clear abuses of discretion by trial courts when there is no adequate remedy at law. *Johnson v. Fourth Court of Appeals*, 700 S.W.2d at 917. A party aggrieved by the granting of a new trial currently has *no* remedy at law because orders granting new trials are not at this time reviewable on appeal. *See supra* at pp. 13-14. Moreover, even if review of a new trial order could be

obtained after a retrial, that remedy would not be "equally convenient, beneficial, and effective as the proceeding by mandamus." *Cleveland v. Ward*, 116 Tex. 1, 285 S.W. 1063, 1068-69 (1926).

Substantial harm flows from the granting of a new trial. The prevailing party is required to fund the litigation all over again, and the delay threatens the party's right of meaningful access to the courts. The parties have completed an expensive and time-consuming trial and now face another. Difficult issues have been sharply contested. Consideration of an order granting a new trial by an appellate court through a mandamus proceeding could materially advance the termination of the litigation and avoid exceptional expense to the parties. Mandamus review would not be overly burdensome to either party and would be less expensive than the cost of a new trial.

B. Mandamus Is Particularly Appropriate in Light of Recent Trends in the Law Involving the Issuance of Mandamus.

Appellate courts currently issue writs of mandamus when trial courts commit a clear abuse of discretion in numerous contexts. For example, the supreme court and courts of appeals now routinely issue writs of mandamus to compel or preclude discovery in a variety of circumstances. *See, e.g., Masinga v. Whittington*, 792 S.W.2d 940 (Tex. 1990) (mandamus conditionally granted to vacate an order preventing the videotaping of a deposition, which the supreme court found to be an abuse of discretion); *Lunsford v. Morris*, 746 S.W.2d 471 (Tex. 1988) (mandamus conditionally granted to vacate order disallowing discovery of net worth); *Garcia v. Peeples*, 734 S.W.2d 343 (Tex. 1987) (mandamus conditionally granted to vacate pretrial discovery order limiting use of discovery documents); *Ginsberg v. Fifth Court of Appeals*, 686 S.W.2d 105 (Tex. 1985) (mandamus conditionally

granted to vacate order of court of appeals precluding trial court from making an independent determination of the discoverability and admissibility of medical records).

Another recent example of the expanded use of mandamus can be seen in the case of *Henderson v. O'Neill*, 797 S.W.2d 905 (Tex. 1990). In *Henderson*, the supreme court issued a writ of mandamus to compel the trial court to vacate an order granting a change of venue because the plaintiff had less than 45 days notice of the hearing. Interlocutory venue orders can be appealed after a trial on the merits. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.064(b) (Vernon 1988). Nevertheless, the court granted the requested mandamus relief.

An even more recent example of expanded mandamus review is seen in *Transamerican Natural Gas Corp. v. Powell*, 34 Tex. Sup. Ct. J. 701 (June 19, 1991). In that case, the supreme court made mandamus relief available to review a trial court's abuse of discretion in imposing discovery sanctions that have the effect of precluding a decision on the merits of a party's claim. The supreme court concluded that the remedy by way of appeal was completely inadequate. *Id.* at 706. Interestingly, the court granted the requested mandamus relief despite the clear language of TEX. R. CIV. P. 215 that sanctions for discovery abuse are reviewable by appeal. *See also Braden v. Downey*, 34 Tex. Sup. Ct. J. 721 (June 19, 1991) (mandamus granted to direct trial court to defer imposition of monetary and community service sanctions until after entry of final judgment).

In light of the expanded availability of mandamus relief, mandamus clearly should be available to set aside new trial orders. An order granting a new trial is the most onerous of all trial court orders, especially in hotly contested cases where the parties have already spent hundreds of thousands of dollars on one trial and now must face the expense of a

second trial. With mandamus available to resolve squabbles over whether particular documents are discoverable and whether a particular deposition should be videotaped, it is absurd for mandamus not to be available to determine whether a party who has prevailed in one trial should have to undergo a second.

C. The Rule Precluding Review of New Trial Orders Should Be Discarded As a Historical Anomaly.

The rationale for the rule precluding review of new trial orders is unclear. From 1872 until at least 1911, Texas courts allowed mandamus to be used to set aside orders granting new trials. In *Lloyd v. Brinck*, 35 Tex. 1 (1872), the Texas Supreme Court issued a writ of mandamus directing the trial court to set aside its order granting a new trial, ruling that there was no error in the jury's verdict and that the granting of a new trial constituted a clear abuse of discretion. The *Brinck* court held that if a party has a clear right to judgment and the trial court commits an abuse of discretion in ordering a new trial, mandamus is the proper remedy to set aside the new trial order. The court further recognized that an appeal from a final judgment after a retrial would be "wholly inadequate." *Id.* at 8.

Brinck has never been expressly overruled or modified by any Texas court. Yet, for reasons difficult to discern, the courts of this State subsequently created a rule exempting new trial orders from review and have continued to follow that rule blindly even though the use of mandamus has expanded significantly in recent years. *See supra* at pp. 15-17.

The peculiar rule exempting new trial orders from review appears to have had its origin in the 1911 decision of *Wright v. Swayne*, 104 Tex. 440, 140 S.W. 221 (1911). Without mentioning *Brinck*, the *Wright* court held that mandamus would not issue unless the order under consideration was

"wholly and absolutely void." Although *Wright* involved a motion for new trial, it is impossible to tell from the court's opinion whether the court intended to restrict mandamus jurisdiction in general by only allowing mandamus for "void" orders or rather intended to create a special rule for new trial orders.

Then in 1926 the supreme court decided *Gulf, C. & S. F. Ry. v. Canty*, 115 Tex. 537, 285 S.W. 296 (1926), in which the court issued a writ of mandamus overturning a new trial order that was based on the trial court's erroneous conclusion that there was an irreconcilable conflict among certain jury findings. The *Canty* court noted that since there was, in fact, no conflict in the jury answers, the trial judge had a ministerial nondiscretionary duty to enter judgment based upon the verdict, but the court also cited the *Brinck* opinion with approval. The *Canty* court's reliance on *Brinck* shows that the court had no intention of overruling *Brinck* and saw no inconsistency between the two decisions.

Although the meaning and import of *Wright* and *Canty* are far from clear, one thing is certain: later courts seized upon the two decisions as authority for the proposition that an order granting a new trial can only be set aside if (1) the order is void or (2) the basis for the order is a conflict in the issues.[5] Born of a misunderstanding of precedent, the rule has become entrenched in Texas jurisprudence even though

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[5] *See, e.g., Employers Reinsurance Corp. v. Holland*, 162 Tex. 394, 347 S.W.2d 605 (1961); *Southland-Greyhound Lines, Inc. v. Richardson*, 126 Tex. 118, 86 S.W.2d 731 (1935); *Missouri-K.-T. R.R. v. Brewster*, 124 Tex. 244, 78 S.W.2d 575 (1934); *Hunsinger v. Boyd*, 119 Tex. 182, 26 S.W.2d 905 (1930); *Anchor v. Martin*, 116 Tex. 409, 292 S.W. 877 (1927); *Cortimeglia v. Davis*, 116 Tex. 412, 292 S.W. 875 (1927); *Angelina Casualty Co. v. Fisher*, 319 S.W.2d 387 (Tex. Civ. App. — Beaumont 1958, no writ); *Union City Transfer v. Kenna*, 210 S.W.2d 431 (Tex. Civ. App. — Beaumont 1948, no writ).

there is not — and never has been — any reason for its existence. The rule is nothing more than a historical anomaly and should be discarded.[6]

D. The Texas Legislature Has Recognized the Right to Review of New Trial Orders.

Continued adherence to the rule exempting new trial orders from review is particularly anomalous since the Texas legislature long ago recognized that new trial orders should be subject to some kind of review. In 1925, the legislature enacted a statute allowing appeals from every order granting a motion for new trial. Act of February 23, 1925, 39th Leg., R.S., ch. 18, § A, 1925 Tex. Gen. Laws 45. Two years later, the legislature suspended the right to appeal new trial orders, proclaiming that "the granting of new trials is largely discretionary with the trial court and not subject to reversal *except for abuse of discretion...*" Act of February 21, 1927, 40th Leg., R.S., ch. 52, § 2, 1927 Tex. Gen. Laws 75-76 (emphasis added). Thus, the legislature recognized that new trial orders could be reviewed for abuse of discretion. But contrary to this explicit acknowledgment of a right to some type of review (presumably by mandamus since there is currently no right to appeal after a second judgment), Texas appellate courts blindly cling to their self-imposed restrictions on the scope of review of new trial orders.

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[6] *See Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916 (Tex. 1985), in which the court cites precedent for the rule without discussing any reason for the rule. *Johnson* is internally inconsistent since it adheres to the rule severely limiting the authority of appellate courts to set aside new trial orders, but at the same time recognizes that mandamus should issue when a trial court clearly abuses its discretion.

IV. THE TEXAS RULE PRECLUDING REVIEW OF NEW TRIAL ORDERS IS UNCONSTITUTIONAL.

A. Defendants Have the Right to Trial by Jury Under the Texas Constitution.

The current Texas rule precluding review of an order granting a new trial effectively permits a trial court to set aside an errorless jury verdict for any reason or no reason at all in derogation of the prevailing party's constitutional right to trial by jury. TEX. CONST. art. I, § 15. A prevailing litigant has a protected interest in the jury's verdict on the merits. Giving trial judges *carte blanche* to set aside jury verdicts violates a litigant's constitutional right to a jury trial.

B. Defendants Are Entitled to Due Process of Law and Equal Protection Under the U.S. and Texas Constitutions.

A rule requiring a party to abide by an arbitrary ruling, violative of its constitutional right to trial by jury, offends due process. A fundamental component of the due process guarantees in the Texas and United States Constitution is that a party be allowed to have the merits of his case "fairly judged." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982). U.S. CONST. amend. V, XIV; TEX. CONST. art. I, §§ 3, 19. The failure to offer litigants *any* appellate or mandamus review of an order arbitrarily granting a new trial violates due process and denies litigants meaningful access to the courts. The Texas judicial system provides some kind of review for every other type of trial court order, and the peculiar exemption of new trial orders from any review contravenes the due process and equal protection clauses of the United States and Texas Constitutions.

C. Defendants Have the Right to Appellate Review Under the Texas Constitution.

The Texas Constitution guarantees litigants the right to obtain review of a trial court's decisions by an appellate court. TEX. CONST. art. I, §§ 13, 19. "A dissatisfied litigant . . . has the constitutional right to have his case reviewed by the Court of Civil Appeals." *Stroud v. Ward*, 36 S.W.2d 590, 591 (Tex. Civ. App. — Waco 1931, no writ). The right to appellate review protects a party's right to due process of law and preserves the integrity of the judiciary by guarding against the arbitrary exercise of judicial power. Rule 81(b) of the Texas Rules of Appellate Procedure serves to implement the constitutional right to appellate review by making any error that "probably prevented the appellant from making a proper presentation of the case to the appellate court" reversible error.

D. Defendants Are Entitled to Protection From Arbitrary Retrial Under the Double Jeopardy Clauses of the U.S. and Texas Constitutions.

The trial court's order in this case violates the double jeopardy clause because it potentially subjects Defendants to multiple or successive punitive damage awards for the same course of conduct when a jury has already absolved Defendants of any liability. U.S. CONST. amend. V; TEX. CONST. art. I, § 14. Because punitive damage awards are designed to be penal in nature, *see Lunsford v. Morris*, 746 S.W.2d 471 (Tex. 1988), Defendants will be subject to double jeopardy by an arbitrary retrial. Therefore, under the double jeopardy clauses of the United States and Texas Constitutions, Defendants are entitled to appellate review of the trial court's decision to grant a new trial.

V. THE TRIAL COURT CLEARLY ABUSED ITS DISCRETION IN GRANTING A NEW TRIAL.

If the trial court's order granting a new trial in this case is subject to review, that order should be set aside because it constituted a clear abuse of discretion.

A. The Trial Court Had No Authority to Grant a New Trial for Avala.

Plaintiffs elected to submit liability issues only as to Intershop's negligence. No issues were submitted as to Avala. An independent ground of recovery which is not submitted or requested is waived. TEX. R. CIV. P. 279. Thus, the trial court plainly erred in granting a new trial as to the entire cause of action. The take-nothing judgment of July 5, 1991 is clearly proper as to Avala.

B. The Trial Court Acted On An Improper Motion.

Plaintiffs' Motion for New Trial did not specify the particular way the evidence was allegedly insufficient to support the verdict. A motion for new trial based on insufficiency of the evidence must distinctly specify the particulars in which the evidence is claimed to be insufficient. *White v. Wadlington*, 78 Tex. 159, 14 S.W. 296 (1890). Plaintiffs' motion merely directed global allegations to a broad form negligence question. The trial court clearly abused its discretion by ruling on an improper motion.

C. The Trial Court's Order Violated Defendants' Constitutional Rights.

By granting a new trial when, as discussed above, the evidence was sufficient to support the jury's verdict, the trial court substituted its view of the evidence for that of the jury and violated Defendants' constitutional right to trial by jury, to access to the courts, to due process of law, to equal protection, and to appellate review. U.S. CONST. amend. V, XIV; TEX. CONST. art. I, §§ 3, 13, 15, 19; TEX. R. APP. P.

81(b). *See supra* at pp. 20-22. Furthermore, by arbitrarily ordering a retrial after a jury had absolved Defendants of liability, the trial court twice placed Defendants in jeopardy of being subjected to punitive damages in violation of the double jeopardy clauses of the United States and Texas Constitutions. U.S. CONST. amend. V; TEX. CONST. art. I, § 14. *See supra* at p. 22.

D. The Trial Court Set Aside the Jury Verdict Without Detailing the Evidence.

The trial court overturned the jury's verdict in this case in a three-line order that merely recited that Plaintiffs' Motion for New Trial (the sole basis for which was that the verdict was against the great weight and preponderance of the evidence) had been heard and granted. A trial court has no greater right to review the factual sufficiency of evidence than the courts of appeals, and a court of appeals cannot set aside a jury finding without first engaging in a detailed review of the evidence. *Larson*, 730 S.W.2d at 641; *Herbert*, 754 S.W.2d at 144; *Pool*, 715 S.W.2d at 635. When granting a new trial on factual sufficiency grounds, a court must detail the evidence relevant to the issue and clearly state why the jury's finding is factually insufficient or is so against the great weight and preponderance as to be manifestly unjust, why it shocks the conscience, or why it clearly demonstrates bias. *Cropper v. Caterpillar Tractor Co.*, 754 S.W.2d 646, 652 (Tex. 1988); *Pool*, 715 S.W.2d at 635.

Thus, before setting aside the verdict returned by the jury for factual insufficiency, the trial court was constitutionally required to enter findings detailing the evidence both in support of and against the verdict and explaining why the verdict was against the great weight and preponderance of

the evidence.[7] *Pool*, 715 S.W.2d at 635. Defendants provided the trial court with a complete Statement of Facts from the entire trial and specifically pointed out the need for findings concerning the evidence. (Ex. 8.) By signing an order granting Plaintiffs a new trial without any explanation, the trial court violated its constitutional duty to make findings that reflected the "mental process" by which it reached its conclusion concerning the insufficiency of the evidence. *Id.*

VI. THE COURT OF APPEALS SHOULD HAVE GRANTED THE WRIT OF MANDAMUS SOUGHT BY RELATORS.

For the same reasons set forth in this Petition as grounds for this Court to issue a writ of mandamus directing the trial court to set aside its new trial order, the First Court of Appeals also should have granted Relators mandamus relief. Relators presented their Petition to the First Court of Appeals on September 9, 1991, but the court denied Relators' Motion for Leave to File Petition for Writ of Mandamus on September 16, 1991. (Ex. 13-16.)

CONCLUSION

The verdict returned by the jury in this case was the result of a fair trial and was amply supported by the evidence. Plaintiffs

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[7] Evidentiary hearings and fact findings by the trial court are required in other cases where constitutional issues are involved. For example, the trial court is required to file findings of fact and conclusions of law in *Batson* cases when peremptory challenges are used to exclude jurors on account of race. *See Batson v. Kentucky*, 476 U.S. 79 (1986) (criminal case); *Keeton v. State*, 724 S.W.2d 58 (Tex. Crim. App. 1987) (Texas criminal case); *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, ___ U.S. ___ (1991) (applying *Batson* rule to civil cases); *Powers v. Palacios*, 34 Tex. Sup. Ct. J. 651 (June 12, 1991) (per curiam) (Texas civil case). The new bonding rules also contemplate hearings and findings by the court. *See* TEX. R. APP. P. 49(b).

were represented by able trial counsel and had a full opportunity to present their case to the jury. They lost. They should not be allowed to retry their case simply because the trial judge believes that they should have won. Mandamus should issue to correct the trial court's clear abuse of discretion in granting Plaintiffs' Motion for New Trial.

EXHIBITS

Certified or sworn copies of the following documents have been bound under separate cover, are being submitted to the Court along with this Petition, and are incorporated by reference as if fully set forth herein:

DESCRIPTION	EXHIBIT NO.
Plaintiffs' Second Amended Original Petition	1
Defendants' Answer to Plaintiffs' Second Amended Original Petition	2
Jury Charge/Verdict	3
Final Judgment	4
Plaintiffs' Motion for New Trial	5
Defendants' Response to Plaintiffs' Motion for New Trial	6
Order Granting Motion for New Trial	7
Defendants' Motion For Reconsideration	8
Order Denying Motion for Reconsideration	9
Tables Concerning Reviewability of New Trial Orders in All 50 States	10
Statement of Facts from Trial (bound in 7 separate volumes)	11
Statement of Facts from Hearing on Motion for Reconsideration (bound in a separate volume)	12

DESCRIPTION	EXHIBIT NO.
Motion for Leave to File Petition for Writ of Mandamus (filed in the First Court of Appeals)	13
Petition for Writ of Mandamus From the District Court of the 269th Judicial District, Harris County, Texas (filed in the First Court of Appeals)	14
Relators' Motion to Transfer Original Exhibits From the Trial Court (filed in the First Court of Appeals)	15
Opinion of the First Court of Appeals Denying Relators' Motion for Leave to File Petition for Writ of Mandamus, dated September 16, 1991	16

RELIEF REQUESTED

As the law court of last resort in this State, this Court clearly has the power to decide the legal issue of whether an order granting a new trial can be reviewed through a mandamus proceeding. This Court also has jurisdiction to determine whether the trial court and the Court of Appeals applied the proper legal standard in reviewing the sufficiency of the evidence to support the jury's verdict. *See Herbert*, 754 S.W.2d at 144; *Pool*, 715 S.W.2d at 634-35.

In view of the legal issues involved in this proceeding, Relators submit that this Court should grant a writ of mandamus directing Judge West to set aside his order granting a new trial and render judgment on the jury's verdict, or alternatively should grant a writ of mandamus directing Judge West to reconsider his order granting a new trial and, if he again decides to grant a new trial, to issue a new trial order detailing the evidence in accordance with the requirements of *Pool*, so that his redrawn order can be reviewed by the Court of Appeals. If, however, the Court concludes that the Court of Appeals is the proper tribunal to determine

whether the trial court clearly abused its discretion in granting a new trial on the ground that the evidence was against the great weight and overwhelming preponderance of the evidence, then this Court should issue a writ of mandamus to the Court of Appeals directing it to consider Relators' Petition in accordance with the requirements of *Pool*. (The Court of Appeals previously denied Relators' Motion for Leave to File Petition for Writ of Mandamus. Ex. 16.) For the reasons set forth in this Petition, the Court of Appeals should have issued a writ of mandamus directing the trial court to set aside its order granting a new trial. (Ex. 13-15.)

PRAYER

WHEREFORE, PREMISES CONSIDERED, Relators pray that this Court grant this Petition for Writ of Mandamus and issue a writ of mandamus directing Respondent West to set aside his order granting a new trial and to render judgment upon the verdict. Alternatively, and without waiving the foregoing, Relators pray that this Court issue a writ of mandamus directing Respondent West to reconsider his order granting a new trial and, if he again decides to grant a new trial, to issue a new trial order detailing the evidence and showing how the verdict was against the great weight and preponderance of the evidence, so that his redrawn order can be reviewed by the Court of Appeals. In the further alternative, and without waiving the foregoing, Relators pray that this Court issue a writ of mandamus directing Respondent First Court of Appeals to consider the Petition for Writ of Mandamus previously filed by Relators in light of the requirements of *Pool* and to determine whether Judge West clearly abused his discretion in granting Plaintiffs' Motion for New Trial. Finally, Relators pray that

this Court grant them such other and further relief to which they are justly entitled.

Respectfully submitted,

VINSON & ELKINS

By /s/ PENELOPE E. NICHOLSON

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Attorneys for Relators,
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d/b/a PLYMOUTH PARK
SHOPPING CENTER, and
INTERSHOP REAL ESTATE
SERVICES, INC., f/k/a HFA
MANAGEMENT USA CO.

AFFIDAVIT OF LOUIS E. McCARTER IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

STATE OF TEXAS §
§
COUNTY OF HARRIS §

Before me, the undersigned authority, on this day personally appeared Louis E. McCarter, known to me to be the individual whose name is subscribed to this Affidavit, who being duly sworn by me, did depose and state as follows:

1. My name is Louis E. McCarter. I am over 21 years of age, have never been convicted of a crime involving moral turpitude, and am in all ways competent to make this Affidavit. I have personal knowledge of all of the facts contained in this Affidavit and all of such facts are true and correct.

2. I am an attorney with the law firm of Vinson & Elkins and am representing Relators Avala of Texas, Inc., d/b/a The Avala Group and d/b/a Plymouth Park Shopping Center and Intershop Real Estate Services, Inc., f/k/a HFA Management USA Company in this proceeding.

3. I have read the foregoing Petition for Writ of Mandamus and have personal knowledge of all of the facts set forth in that Petition. All such facts are true and correct.

FURTHER AFFIANT SAYETH NOT.

/s/ LOUIS E. McCARTER
Louis E. McCarter

SUBSCRIBED and SWORN TO before me on this the 18th day of September, 1991, to which I certify my hand and seal of office.

/s/ TERESA FITZMORRIS
Notary Public In and For
The State of Texas

My Commission Expires:
August 1, 1994

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served upon Respondent and counsel of record, listed below, on this the 20th day of September, 1991, by hand-delivery and/or certified mail, return receipt requested.

Honorable David West
269th Judicial District Court
of Harris County, Texas
301 Fannin Street
Houston, Texas 77002

Honorable F. Lee Duggan, Jr.
Honorable Margaret Garner Mirabal
Honorable Davie L. Wilson
Honorable Kathryn Cox
The First Court of Appeals
1307 San Jacinto Street
Houston, Texas 77002

Mr. Ronald D. Krist
Krist, Gunn, Weller, Neumann
17555 El Camino Real
Houston, Texas 77058

Mr. Jimmy G. Williamson
300 Fannin, Suite 300
Houston, Texas 77002

/s/ PENELOPE E. NICHOLSON

APPENDIX O

IN THE SUPREME COURT OF TEXAS

NO. D1540

AVALA OF TEXAS, INC. d/b/a THE AVALA GROUP
AND d/b/a PLYMOUTH PARK SHOPPING CENTER
AND
INTERSHOP REAL ESTATE SERVICES, INC.
f/k/a HFA MANAGEMENT USA CO.,
Relators

V.

THE HONORABLE DAVID WEST
JUDGE OF THE 269TH DISTRICT COURT
HARRIS COUNTY, TEXAS
AND
THE HONORABLE FIRST COURT OF APPEALS,
Respondents.

ANSWER TO PETITION FOR WRIT OF MANDAMUS

TO THE HONORABLE JUSTICES OF SAID COURT:

COME NOW Gregorio Garcia, Individually and as Surviving Husband of Patricia Wilson Garcia and As Next Friend of Alicia Nicole Garcia, and Robert G. Wilson and Teresa S. Wilson, Individually and As Surviving Parents of Patricia Wilson Garcia ("Plaintiffs"), the real parties in interest, and file this original Answer in response to the Petition for Writ of Mandamus filed by Avala and Intershop, Relators, and for answer would show:

PARTIES

The Petition accurately identifies the Respondent and the real parties in interest as required by Rule 121 of the Texas Rules of Appellate Procedure.

FACTS[1]

Plaintiffs filed suit against Relators (the owner and manager of the Plymouth Park Shopping Center) to recover damages for the death of Patricia Wilson Garcia who was murdered as she was attempting to buy stamps at a self-service postal island located in the parking lot of the center. After a jury trial resulted in a verdict favorable to Relators (Ex. 3), Respondent entered judgment on the verdict in Relators' favor (Ex. 4). On Plaintiffs' motion (Ex. 5), the Court entered an order granting a new trial (Ex. 7). Although the order specified no reason, Respondent indicated during the hearing on Relators' motion for reconsideration that the new trial was granted in the interest of justice (Ex. 12, at 8). Relators now seek leave to file a petition for writ of mandamus to review Respondent's order.

RELIEF SOUGHT

Relators ask this Court to overturn 80 years of Supreme Court precedent to the effect that orders granting new trials are not reviewable by mandamus. They fail to state the basis for the relief; similarly, they fail to state the compelling circumstances which establish the necessity for the writ.

QUESTIONS PRESENTED

1. Should this Court abandon the long-standing rule that a trial court order granting a new trial is not reviewable by

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[1] As the Petition contains factual material not called for by Rule 121(a)(2)(C) of the Rules of Appellate Procedure, Plaintiffs supply the required statement.

mandamus except in two circumstances not presented on this record?[2]

2. Whether the long-standing rule that trial court orders granting a new trial are not reviewable by writ of mandamus violates either the Texas or U.S. Constitution?[3]

BRIEF OF THE ARGUMENT

1. There is no reason to overturn 80 years of Supreme Court precedent that trial court orders granting new trials are not reviewable by mandamus.

Relators acknowledge that mandamus has not been available to review trial court orders granting new trials since the decision in *Wright v. Swayne*, 140 S.W. 221 (Tex. 1911). They also acknowledge that the rule has been reaffirmed as recently as 1985 in *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916 (Tex. 1985), a security case in which the plaintiff sought mandamus. This concession alone would justify overruling the motion for leave to file in accordance with the provisions of Rule 121(c) of the Rules of Appellate Procedure.[4]

Instead, Relators argue that this Court should overturn its long-established precedent because the rule, in its view, ". . . should be discarded as a (*sic*) historical anomaly

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[2] A trial court's order granting a new trial is subject to review by mandamus if the order is wholly void or is based on a perceived conflict in jury answers. *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 918 (Tex. 1985); *see* O'Connor, Texas Rules §7.2, at 607 (1991).

[3] The related question of the constitutionality of the decision of this Court that an order granting a new trial is not reviewable on appeal from the judgment entered after the second trial, *Cummins v. Paisan Const. Co.*, 682 S.W.2d 235, 236 (Tex. 1984), cannot conceivably be before this Court by way of mandamus.

[4] This is not to suggest that this Court lacks jurisdiction to grant the writ. *See* Tex. Gov't Code Ann. §22.002(a) (Vernon 1988).

(Pet. 16-18)," particularly in light of recent trends which have expanded the availability of mandamus to review discovery orders (Pet. 14-16). These arguments will not withstand analysis.

The duty of a trial judge to grant a new trial in the interest of justice is deeply rooted in our jurisprudence, as this Court observed nearly a hundred years ago in *Choate v. San Antonio & A.P.Ry. Co.*, 37 S.W. 319 (Tex. 1896):

> Although there may be sufficient evidence in a case to require the court to submit it to the jury, yet if the verdict rendered thereon is against the preponderance of the evidence, to that degree which shows that manifest injustice has been done, the trial court may and should grant a new trial. The judge should not invade the province of the jury and take from it the decision of a question which properly belongs to it. Neither should he abdicate the functions of his office, and permit the prerogatives of the jury to be perverted to the accomplishment of wrong.

This principle was reaffirmed by this Court recently in *Cropper v. Caterpillar Tractor Co.*, 754 S.W.2d 646, 652 (Tex. 1988); in dealing with the closely related power of appellate courts to review fact questions, this Court said "[t]he right of trial by jury and appellate court review of fact questions have peacefully co-existed for almost 150 years, and are thoroughly rooted in our constitution and judicial system."[5]

Relators will respond that trial courts should have the power to grant new trials; however, they contend that a trial court order granting a new trial should be reviewable. There are two simple answers to this contention. First, an appellate court's action in ordering a new trial on similar grounds is

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[5] In so holding, this Court quoted its opinion in *Hopson v. Gulf Oil Corp.*, 237 S.W.2d 352, 358 (1951), which equated appellate court review with trial court power to grant new trials.

not reviewable. Tex. Const. art. V, §6; *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 634 (Tex. 1986). *See* Calvert, "*No Evidence" and "Insufficient Evidence" Points of Error*, 38 Tex. L. Rev. 361, 368 (1960).

Second, considerations of judicial economy mitigate against review of orders granting new trials. Under the present scheme, only one court (trial or appellate) reviews jury findings for factual sufficiency. If a new trial is granted by the trial court, there is nothing for the appellate court to review. If a judgment is entered on the verdict, then the court of appeals may review the findings for factual sufficiency. Under the scheme which Relators contend for two courts (both trial and appellate) are required to look at the record of the first trial. Then, assuming the trial court's order is upheld, the same appellate court will be required to review essentially the same record a second time on appeal of the judgment resulting from a second trial. In substance, Relators might as well argue that trial courts should be stripped of their time honored responsibility to grant new trials. At least, under such a system, the appellate court would have to review a record for factual sufficiency only once. In practical terms, that will be the result; experienced trial judges will simply enter judgment on the verdict, leaving questions of factual sufficiency to be determined by appellate judges who, unlike the trial judge, have not had the benefit of observing the conduct and demeanor the witnesses and parties and whose evaluation of the potential unjustness of the result must, of necessity, be gleaned from a cold written record.

In a sense, Relators' argument based on the expanded use of mandamus to review discovery orders proves too much. The facts are rarely in dispute in discovery contexts. Accordingly, mandamus is an appropriate procedural device for

reviewing claimed abuses of discretion during discovery. The same cannot be said of factual sufficiency questions.

2. Neither the Texas nor the U.S. Constitution requires that Relators be entitled to review an order granting a new trial by writ of mandamus.

a. Right to trial by jury.[6]

It is well established that the action of a court of appeals setting aside a jury finding as against the great weight and preponderance of the evidence is not violative of Tex. Const. art. I, §15. *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 634 (Tex. 1986). If the action of an appellate court setting aside a jury finding on the basis of a written record does not violate the right to trial by jury, then action of a trial judge who has had the benefit of observing the conduct and demeanor of the witnesses and parties and who is in a much better position to evaluate the extent to which an injustice may have been done, *cf. Larson v. Cactus Utility Co.*, 730 S.W.2d 640, 642 (Tex. 1987) (Hill, C.J., dissenting), presents no constitutional question. Since the decision of a court of appeals is not reviewable, Tex. Const. art. V., §6, it is less than clear why the action of the trial judge need be reviewable, much less, by way of mandamus.

b. Relators have not been denied due process or equal protection.

Relators cite no case, and Plaintiffs are aware of none, holding that the due process clauses of the Texas or U.S. Constitution require that interlocutory orders in general or orders granting new trials in particular be reviewable by way of mandamus. Although the related questions of non-

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[6] As the Seventh Amendment right to jury trial has not been made applicable to the states, *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211 (1916), this discussion is confined to decisions under the Texas Constitution.

reviewability under Tex. Civ. Prac. & Rem. Code §51.012 (Vernon 1987) or on appeal of a final judgment after the second trial, *Cummins, supra*, are not before the Court, it is also worth noting that Relators cite no authority indicating that due process requires that such an interlocutory order be appealable *at some state.*

The failure of Relators to brief the federal decisions is, of course, understandable. A similar order of a federal trial court granting a new trial is not reviewable by either mandamus or appeal. *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33 (1980) (mandamus not available); *Eaton v. National Steel Products Co.*, 624 F.2d 863 (9th Cir. 1980) (order not appealable).[7]

Simply put, the Texas scheme jealously protects the inherent power of a trial judge to grant a new trial in the interest of justice. Instead of making the order reviewable, it protects the litigants by limiting the number of new trials that can be granted in the same cause because of insufficiency or weight of the evidence. Tex.R.Civ.P. 326. Accordingly, the state's interest in fashioning its own rules of procedure is paramount to any discernable federal interest, except perhaps an interest in protecting the individual from state action that is wholly arbitrary or irrational, *cf. Martinez v. California*, 444 U.S. 277, 282 (1980).

This brings to the equal protection analysis. There is no equal protection problem because litigants who might wish

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[7] Although the *Daiflon* result is bottomed in part on the availability of review on appeal from the judgment following the second trial, the case by no means stands for the proposition that even federal litigants are constitutionally entitled to review (*at some stage*) of every interlocutory order. Even if that were the law, it would not make mandamus available. *See State v. Walker*, 679 S.W.2d 484, 485 (Tex. 1984) (mandamus will lie only to correct abuse of discretion or violation of clear duty *and* when there is no other adequate remedy at law).

to complain of an order granting a new trial are treated alike; all are denied review. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 438-39 (1982) (Blackmun, J., concurring).

c. Jeopardy is not an issue in a civil case.

Relators' jeopardy claim is a classic case of a "federal question" so absolutely devoid of merit as to be frivolous. *Equitable Life Assurance Society v. Brown*, 187 U.S. 308 (1902). Jeopardy provides three related protections in *criminal* cases:

> It protects against a second prosecution for the same events after acquittal. It protects against a second prosecution for the same events after conviction. And it protects against multiple punishments for the same event. *North Carolina v. Pierce*, 395 U.S. 711, 717 (1969).

Even in criminal cases a defendant may be retried after reversal because of errors at the trial. *United States v. Tateo*, 377 U.S. 463, 473 (1964) (Goldberg, J., dissenting). Relators' claim of jeopardy in a civil case requires no further discussion.

d. Denial of mandamus is not equivalent to denial of the right to an appeal.

It is undisputed that Relators will be entitled to appeal any judgment which might be entered against them following the second trial. Although they will not be entitled to review the order granting a new trial under the reasoning of *Cummins*, *supra*, any complaint properly preserved in the second trial clearly will be before the appellate court for review.[8]

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[8] At that time they will be free to assert their position that Plaintiffs waived their right to recovery against Avala (Pet. 22). Given the fact that the undisputed evidence in the case establishes that Intershop was acting as the agent of Avala (S.F. 836), that effort is likely to be unsuccessful. Nevertheless, that is for another court on another day.

CONCLUSION

Respondent, an experienced trial judge, granted a new trial in the interest of justice (Ex. 12, at 8, 17). As the order is not reviewable by mandamus, the Court of Appeals properly denied leave to file (Ex. 16) and motion for leave to file should be denied by this Court.[9]

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[9] The argument that the trial court acted on an improper motion and failed to detail the evidence in the way in which appellate courts are required to do (Pet. 23-24) is patently frivolous. The trial judge can grant a new trial on his own motion, Tex.R.Civ.P. 320, and even *Larson*, *supra*, stops short of requiring the trial judge to detail the evidence in the process of ordering a new trial conditioned on remittitur. Moreover, there is a good reason for the *Pool* requirement that appellate courts detail the evidence. They, unlike the trial court, were not *there* at the trial.

EXHIBITS

Although Plaintiffs have no additional exhibits, they observe that this proceeding may be disposed of without reference to Exhibits 10 and 11.

Respectfully submitted,

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713/223-3330

Attorney Ad Litem for
ALICIA NICOLE GARCIA

KRIST, GUNN, WELLER
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Attorneys for Plaintiffs

AFFIDAVIT OF KEVIN D. KRIST

STATE OF TEXAS §
COUNTY OF HARRIS §

BEFORE ME, the undersigned authority on this day personally appeared KEVIN D. KRIST, known to me to be the individual whose name is subscribed to this affidavit, who being duly sworn by me did depose and state as follows:

1. My name is KEVIN D. KRIST. I am over 21 years of age, have never been convicted of a crime involving moral turpitude, and am in all ways competent to make this affidavit.

2. I am an attorney with the law firm of Krist, Gunn, Weller, Neumann and Morrison and am representing Plaintiffs in this proceeding.

3. I have read the foregoing Answer to Petition for Writ of Mandamus and have personal knowledge of all the facts set forth in that Petition. All such facts are true and correct.

/s/ KEVIN D. KRIST
Kevin D. Krist, Affiant

SUBSCRIBED AND SWORN TO BEFORE me on the 24th day of September, 1991, to certify which witness my hand and official seal of office.

/s/ TERRI W. JONES
Notary Public — State of Texas

CERTIFICATE OF SERVICE

I, Perry O. Barber Jr., hereby certify that on the 24th day of September, 1991, a true and correct copy of the foregoing instrument was furnished to Respondents and counsel of record in this cause by messenger and/or certified mail, return receipt requested.

/s/ PERRY O. BARBER, JR.
Perry O. Barber Jr.

APPENDIX P

THE SUPREME COURT OF TEXAS

NO. D-1540

AVALA OF TEXAS, INC. d/b/a THE AVALA GROUP
AND d/b/a PLYMOUTH PARK SHOPPING CENTER

AND

INTERSHOP REAL ESTATE SERVICES, INC.,
F/K/A HFA MANAGEMENT USA CO.,

Relators

V.

THE HONORABLE DAVID WEST
JUDGE OF THE 269TH DISTRICT COURT
HARRIS COUNTY, TEXAS

AND

THE HONORABLE FIRST COURT OF APPEALS,

Respondents

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS

TO THE HONORABLE SUPREME COURT OF TEXAS:

COME NOW Relators, Avala of Texas, Inc. d/b/a The Avala Group and d/b/a Plymouth Park Shopping Center (hereafter "Avala") and Intershop Real Estate Services, Inc., f/k/a HFA Management USA Co. (hereafter "Intershop"), complaining of the Honorable David West, Judge of the 269th Judicial District Court of Harris County, Texas, and also complaining of the Honorable First Court of Appeals, and move this Court to grant leave to file their Petition for

Writ of Mandamus. In support of this Motion, Relators would respectfully show the following:

I.

Relators presented their Petition for Writ of Mandamus to the First Court of Appeals on September 9, 1991. On September 16, 1991, the First Court of Appeals denied Relators' Motion for Leave to File Petition for Writ of Mandamus. Thus, Relators have satisfied the requirements of TEX. R. APP. P. 121(a)(1).

II.

The Petition for Writ of Mandamus that Relators are tendering to this Court and the Exhibits to that Petition for Writ of Mandamus are attached and incorporated by reference as if fully set forth herein.

III.

Relators have tendered the cash deposit for costs as required by the Texas Rules of Appellate Procedure.

IV.

Respondent West clearly abused his discretion in granting a new trial to the Plaintiffs and Real Parties in Interest, Gregorio Garcia (Individually and as Surviving Husband of Patricia Wilson Garcia and as Next Friend of Alicia Garcia) and Robert G. Wilson and Theresa S. Wilson (Individually and as Surviving Parents of Patricia Wilson Garcia). The granting of Plaintiffs' Motion for New Trial constituted a clear abuse of discretion for the following reasons:

1. Plaintiffs waived any claims against Avala by failing to request any jury questions concerning Avala's liability. Thus, Plaintiffs are not entitled to re-try their claims

against Avala, and the judgment should be final as to Avala.

2. The sole basis for Plaintiffs' Motion for New Trial was Plaintiffs' contention that the jury's verdict was against the great weight and preponderance of the evidence. Plaintiffs' motion did not, however, distinctly specify the particulars in which the evidence was allegedly insufficient to support the verdict. Therefore, the trial court acted on an improper motion.

3. Respondent West failed to detail the evidence both in support of and contrary to the jury's finding before granting a new trial based on insufficiency of the evidence as required by the Texas Constitution and the decisions of the Texas Supreme Court.

4. The evidence was clearly sufficient to support the jury's verdict. The verdict was plainly not against the great weight and overwhelming preponderance of the evidence. In granting Plaintiffs' Motion for New Trial, Respondent West substituted his view of the evidence for that of the jury and violated Defendants' state and federal constitutional rights to a trial by jury, to access to the courts, to due process of law, to equal protection, and to appellate review.

V.

Because Respondent West clearly abused his discretion in granting Plaintiffs' Motion for New Trial and because Relators had no adequate remedy at law, Respondent First Court of Appeals should have issued a writ of mandamus directing Respondent West to set aside his order granting a new trial.

WHEREFORE, PREMISES CONSIDERED, Relators respectfully request that this Court grant leave to file the

attached Petition for Writ of Mandamus, that the same be set for hearing with notice to all interested parties, that all relief requested in the Petition for Writ of Mandamus be granted, and that Relators be granted such other and further relief to which they may show themselves justly entitled.

Respectfully submitted,

VINSON & ELKINS

By /s/ PENELOPE E. NICHOLSON

Louis E. McCarter
TBA No. 13367000
Marie R. Yeates
TBA No. 22150700
Penelope E. Nicholson
TBA No. 15011500
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Attorneys for Relators, AVALA OF TEXAS, INC. d/b/a PLYMOUTH PARK SHOPPING CENTER, and INTERSHOP REAL ESTATE SERVICES, INC., f/k/a HFA MANAGEMENT USA CO.

VERIFICATION

STATE OF TEXAS §
§
COUNTY OF HARRIS §

Before me, the undersigned authority, on this day personally appeared Louis E. McCarter, who being duly sworn by me on his oath that he has read the above and foregoing and that the statements contained therein are true and correct.

/s/ LOUIS E. MCCARTER
Louis E. McCarter

SUBSCRIBED and SWORN TO before me on this the 18th day of September, 1991, to which I certify my hand and seal of office.

/s/ TERESA FITZMORRIS
Notary Public In and For
The State of Texas

My Commission Expires:
8-1-94

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served upon Respondents and counsel of record, listed below, on this the 20th day of September, 1991, by hand-delivery and/or certified mail, return receipt requested.

Honorable David West
269th Judicial District
Court of
Harris County, Texas
301 Fannin Street
Houston, Texas 77002

Honorable F. Lee Duggan, Jr.
Honorable Margaret
Garner Mirabal
Honorable Davie L. Wilson
Honorable Kathryn Cox
The First Court of Appeals
1307 San Jacinto Street
Houston, Texas 77002

Mr. Ronald D. Krist
Krist, Gunn,
Weller, Neumann
17555 El Camino Real
Houston, Texas 77058

Mr. Jimmy G. Williamson
300 Fannin, Suite 300
Houston, Texas 77002

/s/ PENELOPE E. NICHOLSON

APPENDIX Q

IN THE SUPREME COURT OF TEXAS

NO. D1540

AVALA OF TEXAS, INC. d/b/a THE AVALA GROUP
AND d/b/a PLYMOUTH PARK SHOPPING CENTER

AND

INTERSHOP REAL ESTATE SERVICES, INC.
f/k/a HFA MANAGEMENT USA CO.,

Relators

V.

THE HONORABLE DAVID WEST
JUDGE OF THE 269TH DISTRICT COURT
HARRIS COUNTY, TEXAS
AND
THE HONORABLE FIRST COURT OF APPEALS,

Respondents.

RELATORS' MOTION FOR REHEARING

TO THE HONORABLE SUPREME COURT
OF TEXAS:

COME NOW Relators (Defendants in the trial court), Avala of Texas, Inc. d/b/a The Avala Group and d/b/a Plymouth Park Shopping Center (hereafter "Avala") and Intershop Real Estate Services, Inc. f/k/a HFA Management USA Co. (hereafter "Intershop"), and file this their Motion for Rehearing in connection with this Court's Order overruling Relators' Motion for Leave to File Petition for Writ of

Mandamus and in connection with the court's Order overruling Relators' Motion to Transfer Original Exhibits from the Trial Court:

I.

Relators filed a Motion for Leave to File Petition for Writ of Mandamus with this Court on September 20, 1991. Along with the Motion, Relators tendered to the Court a Petition for Writ of Mandamus and Exhibits to the Petition for Writ of Mandamus. In addition, Relators paid the cash deposit for costs required by the Texas Rules of Appellate Procedure. At the same time that Relators initiated this mandamus proceeding, they also filed a Motion to Transfer Original Exhibits from the Trial Court.

II.

On October 2, 1991, this Court overruled Relators' Motion for Leave to File Petition for Writ of Mandamus and also overruled Relators' Motion to Transfer Original Exhibits from the Trial Court.

III.

In their Petition for Writ of Mandamus, Relators asked this Court to issue a writ of mandamus directing Judge West to set aside his order granting a new trial, and alternatively asked this Court to issue a writ of mandamus directing the First Court of Appeals to consider and rule on the complaints made by Relators in their Petition in connection with Judge West's order granting a new trial.

IV.

For the reasons stated in Relators' Motion for Leave to File Petition for Writ of Mandamus and in Relators' Petition for Writ of Mandamus, the trial court's decision to

grant a new trial in this case constituted a clear abuse of discretion.[1] After a hard-fought, sharply contested trial that lasted seven days, the jury returned a verdict in Defendants' favor. Although there was ample evidence in the record to support the jury's verdict, Plaintiffs moved for a new trial on the sole ground that the verdict was against the great weight and overwhelming preponderance of the evidence. Because the verdict plainly was *not* against the great weight and preponderance of the evidence, the trial court committed a clear abuse of discretion and violated Defendants' constitutional rights in granting Plaintiffs' Motion for New Trial.

V.

Through their Petition for Writ of Mandamus, Relators sought to challenge the unjust and unconstitutional rule that shields a trial judge's order granting a new trial from any review whatsoever unless the order is wholly void or expressly based on a perceived conflict in jury answers. As Relators pointed out in their Petition, the rule makes a mockery of the jury system by effectively allowing trial courts to toss out errorless jury verdicts for no reason at all.

VI.

The unconstitutional rule precluding review of new trial orders is currently being challenged in another mandamus action pending before this Court, *Ali Rejali v. Schneider*, D-0978. This Court initially overruled Ali Rejali's motion for leave to file petition for writ of mandamus, but the

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[1] Relators' Motion for Leave to File Petition for Writ of Mandamus, Relators' Petition for Writ of Mandamus, the Exhibits to Relators' Petition for Writ of Mandamus, and Relators' Motion to Transfer Original Exhibits from the Trial Court are incorporated by reference as part of this Motion as if fully set forth herein.

matter is now pending before the Court on a motion for rehearing.

VII.

In *Ali Rejali,* the trial court granted a new trial after a large judgment had been entered in favor of the plaintiff. In the present case, the trial court granted a new trial after a verdict had been entered in favor of Defendants. Both cases involve the issue of whether mandamus can be used to correct a trial court's clear abuse of discretion in granting a new trial.

VIII.

Relators submit that if, in *Ali Rejali,* this Court determines that mandamus can be used to correct a trial court's clear abuse of discretion in granting a new trial, then the Court should make mandamus relief available in this case and should issue a writ of mandamus compelling Judge West to set aside his new trial order.

FOR THE REASONS stated in this Motion, in Relators' Motion for Leave to File Petition for Writ of Mandamus, and in Relators' Petition for Writ of Mandamus, Relators pray that this Court grant their Motion for Rehearing, that the Court grant them leave to file their Petition for Writ of Mandamus, and that the Court grant them all relief requested in their Petition for Writ of Mandamus. Relators further pray that the Court grant them the relief requested in their Motion to Transfer Original Exhibits from the Trial Court for the reasons set forth in that Motion. Finally, Relators pray that this Court grant them such other and

further relief to which they may show themselves justly entitled.

Respectfully submitted,

VINSON & ELKINS

By /s/ PENELOPE E. NICHOLSON

Louis E. McCarter
TBA No. 13367000
Marie R. Yeates
TBA No. 22150700
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AVALA OF TEXAS, INC.
d/b/a PLYMOUTH PARK
SHOPPING CENTER, and
INTERSHOP REAL ESTATE
SERVICES, INC., f/k/a HFA
MANAGEMENT USA CO.

VERIFICATION

THE STATE OF TEXAS §
§
COUNTY OF HARRIS §

BEFORE ME, the undersigned authority on this day personally appeared Penelope E. Nicholson, who after being duly and properly sworn by me, stated that she has read the foregoing and that the statements contained therein are true and correct.

/s/ PENELOPE E. NICHOLSON
Penelope E. Nicholson

SUBSCRIBED and SWORN to before me on this the 11th day of October, 1991, and given under my hand and seal of office.

/s/ TERESA FITZMORRIS
Notary Public In and For
The State of Texas

My Commission Expires:
August 1, 1994

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served upon Respondents and counsel of record, listed below, on this the 14th day of October, 1991, by hand-delivery and/or certified mail, return receipt requested.

Honorable David West
269th Judicial District Court
of Harris County, Texas
301 Fannin Street
Houston, Texas 77002

Honorable F. Lee Duggan, Jr.
Honorable Margaret
Garner Mirabal
Honorable Davie L. Wilson
Honorable Kathryn Cox
The First Court of Appeals
1307 San Jacinto Street
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Mr. Ronald D. Krist
Krist, Gunn, Weller,
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17555 El Camino Real
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Mr. Jimmy G. Williamson
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Houston, Texas 77002

/s/ PENELOPE E. NICHOLSON

APPENDIX R
Table 1

Jurisdiction	Immediate Appeal	Discretionary Appeal[1]	Appeal After Retrial	No Review
ALABAMA	X			
ALASKA		X		
ARIZONA	X			
ARKANSAS	X			
CALIFORNIA	X			
COLORADO			X	
CONNECTICUT			X	
DELAWARE		X		
FLORIDA	X			
GEORGIA		X	X	
HAWAII		X	X	
IDAHO	X			
ILLINOIS		X	X	
INDIANA	X			
IOWA	X			
KANSAS		X		
KENTUCKY			X	
LOUISIANA		X		
MAINE			X	
MARYLAND				X[2]
MASSACHUSETTS			X	
MICHIGAN		X		
MINNESOTA	X	X		
MISSISSIPPI		X		
MISSOURI	X			
MONTANA	X			
NEBRASKA	X			
NEVADA	X			
NEW HAMPSHIRE	X			
NEW JERSEY		X		

Jurisdiction	Immediate Appeal	Discretionary Appeal[1]	Appeal After Retrial	No Review
NEW MEXICO				×
NEW YORK	×	×		
NORTH CAROLINA	×			
NORTH DAKOTA	×			
OHIO	×		×	
OKLAHOMA	×		×	
OREGON	×			
PENNSYLVANIA	×			
RHODE ISLAND	×			
SOUTH CAROLINA	×			
SOUTH DAKOTA	×			
TENNESSEE		×	×	
TEXAS				×
UTAH		×	×	
VERMONT		×		
VIRGINIA				×
WASHINGTON	×			
WEST VIRGINIA	×			
WISCONSIN		×		
WYOMING	×			
TOTAL	***27***	***16***	***12***	***4***

[1] Appeal allowed if it will prevent unnecessary delay, expense, hardship, or if it will advance the termination of the litigation, or if other related factors are present.

[2] Although orders for new trial are not appealable, a recent decision questions that rule and states that the better rule and more recently expressed view is that the grant of a new trial should be appealable in extraordinary circumstances. *Franklin* v. *Gupta*, 567 A.2d 524, 533 (Md. Ct. Spec. App. 1990).

Table 2

STATE	METHOD OF REVIEW	AUTHORITY
ALABAMA	Immediate appeal	ALA. CODE § 12-22-10 (1986); *John Crane-Houdaille, Inc. v. Lucas*, 534 So. 2d 1070, 1074 (Ala. 1988).
ALASKA	Discretionary appeal	ALASKA R. APP. P. 202, 401-02; *Nolan v. Sea Airmotive, Inc.*, 627 P.2d 1035, 1038 n.7 (Alaska 1981).
ARIZONA	Immediate appeal	ARIZ. REV. STAT. ANN. § 12-2101(F)(1) (1982 & Supp. 1990); *Wells v. Tanner Bros. Contracting Co.*, 439 P.2d 489, 492 (Ariz. 1968).
ARKANSAS	Immediate appeal	ARK. R. APP. P. 2(a)(3); *Smith v. Arkansas State Highway Comm'n*, 728 S.W.2d 202, 202 (Ark. Ct. App. 1987).
CALIFORNIA	Immediate appeal	CAL. CIV. PROC. CODE § 904.1(d) (West 1980 & Supp. 1991); *Kolar v. County of Los Angeles*, 127 Cal. Rptr. 15, 16 n.1 (Cal. Ct. App. 1976).
COLORADO	Appeal after retrial	COLO. R. CIV. P. 59(h) (Supp. 1989); *Rice v. Groat*, 449 P.2d 355, 356 (Colo. 1969).
CONNECTICUT	Appeal after retrial	CONN. GEN. STAT. ANN. § 52-263 (West 1991); *Gold v. Newman*, 560 A.2d 960, 961-63 (Conn. 1989).
DELAWARE	Discretionary appeal	DEL. SUP. CT. R. 42(b)(iii), (v); *Storey v. Camper*, 401 A.2d 458, 465 (Del. 1979).
FLORIDA	Immediate appeal	FLA. STAT. ANN. § 59.04 (West 1969 & Supp. 1991); *Clement v. Aztec Sales, Inc.*, 297 So. 2d 1, 2 (Fla. 1974).
GEORGIA	Discretionary appeal or appeal after retrial	GA. CODE ANN. §§ 5-5-50, 5-6-33(a)(1), 5-6-34(b), 9-11-54(b) (Michie 1982 & Supp. 1991); *Henderson v. Henderson*, 200 S.E.2d 867, 868 (Ga. 1973).
HAWAII	Discretionary appeal or appeal after retrial	HAW. REV. STAT. § 641-1(b) (1988); HAW. R. CIV. P. 54(b); *Harkins v. Ikeda*, 557 P.2d 788, 790 (Haw. 1976); *Lui v. City & County of Honolulu*, 634 P.2d 595, 598 (Haw. 1981).
IDAHO	Immediate appeal	IDAHO R. APP. P. 11(a)(5); *Smallwood v. Dick*, 761 P.2d 1212, 1215 (Idaho 1988).

STATE	METHOD OF REVIEW	AUTHORITY
ILLINOIS	Discretionary appeal or appeal after retrial	ILL. ANN. STAT. ch. 110A, para. 306(a)(1)(i) (Smith-Hurd 1989); *Robbins v. Professional Constr. Co.*, 380 N.E.2d 786, 788 (Ill. 1978).
INDIANA	Immediate appeal	IND. CODE ANN. § 34-1-47-1(b) (West 1983 & Supp. 1991); *Topper v. Dunn*, 177 N.E.2d 382, 384 (Ind. Ct. App. 1961).
IOWA	Immediate appeal	IOWA R. APP. P. 1(A); *Sheldon v. Moyer*, 210 N.W.2d 597, 599 (Iowa 1973).
KANSAS	Discretionary appeal	KAN. CIV. PROC. CODE ANN. § 60-2102(b) (Vernon 1967 & Supp. 1991); *Mettee v. Urban Renewal Agency*, 547 P.2d 356, 358-59 (Kan. 1976).
KENTUCKY	Appeal after retrial	KY. REV. STAT. ANN. § 22A.020 (Baldwin 1988); KY. R. CIV. P. 59.01; *Shelby County Bd. of Educ. v. Wright*, 390 S.W.2d 654, 655-56 (Ky. 1965).
LOUISIANA	Discretionary appeal	LA. CODE CIV. PROC. ANN. art. 2083 (West 1961 & Supp. 1991); *Miller v. Chicago Ins. Co.*, 320 So. 2d 134, 136 (La. 1975).
MAINE	Appeal after retrial	*Town of Eliot v. Burton*, 392 A.2d 56, 58 n.2 (Me. 1978).
MARYLAND	No review — rule has been questioned recently	MD. CTS. & JUD. PROC. CODE ANN. §§ 12-301, 12-303 (1989 & Supp. 1991); *Rocks v. Brosius*, 217 A.2d 531, 551 (Md. 1966); *Franklin v. Gupta*, 567 A.2d 524, 533 (Md. Ct. Spec. App. 1990).
MASSACHUSETTS	Appeal after retrial	*Brooksbank v. Epstein*, 363 N.E.2d 291, 292 (Mass. App. Ct. 1977).
MICHIGAN	Discretionary appeal	MICH. R. APP. P. 7.203, 7.205, 7.301(A); *Benmark v. Steffen*, 157 N.W.2d 468, 470-71 (Mich. Ct. App. 1968).
MINNESOTA	Immediate appeal (limited circumstances) and discretionary appeal	MINN. STAT. ANN. §§ 103.03(d), 105.01 (West Supp. 1991); *Haugen v. International Transp., Inc.*, 379 N.W.2d 529, 530-31, 530 n.1 (Minn. 1986); *Ginsberg v. Williams*, 135 N.W.2d 213, 216-18 (Minn. 1965).
MISSISSIPPI	Discretionary appeal	MISS. SUP. CT. R. 5(a); *McDaniel v. Ritter*, 556 So. 2d 303, 306-07 (Miss. 1989).

STATE	METHOD OF REVIEW	AUTHORITY
MISSOURI	Immediate appeal	MO. ANN. STAT. § 512.020 (Vernon 1952); *Travagliante v. J.W. Wood Realty Co.*, 425 S.W.2d 208, 210-11 (Mo. 1968).
MONTANA	Immediate appeal	MONT. CODE ANN. § 25-21-1(b)(2) (1991); MONT. R. APP. P. 1(b)(2); *Continental Ins. Co. v. Bottomly*, 760 P.2d 73, 75 (Mont. 1988).
NEBRASKA	Immediate appeal	NEB. REV. STAT. § 25-1315.03 (1989); *Mueller v. Keeley*, 80 N.W.2d 707, 710 (Neb. 1957).
NEVADA	Immediate appeal	NEV. R. APP. P. 3A(b)(2); *Bates v. Nevada Sav. & Loan Ass'n*, 456 P.2d 450, 451 n.1 (Nev. 1969).
NEW HAMPSHIRE	Immediate appeal	*Hodgdon v. Beatrice D. Weeks Mem. Hosp.*, 515 A.2d 1199 (N.H. 1986).
NEW JERSEY	Discretionary appeal	N.J. R. APP. P. 2:2-1 to -5; *McGowan v. Barry*, 510 A.2d 95, 96 n.2 (N.J. Super. Ct. App. Div. 1986).
NEW MEXICO	No review	N.M. R. APP. P. 12-201; *Warren v. Zimmerman*, 484 P.2d 1293-94 (N.M. Ct. App. 1971).
NEW YORK	Immediate appeal (limited circumstances) and discretionary appeal	N.Y. CIV. PRAC. L. & R. 5701(a)(2)(iii), (c) (McKinney 1978); *McGyln v. Johnson*, 184 N.Y.S.2d 209, 213 (N.Y. Sup. Ct. 1959).
NORTH CAROLINA	Immediate appeal	N.C. GEN. STAT. § 7A-27(d)(4) (1989); *J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 362 S.E.2d 812, 815 (N.C. Ct. App. 1987); *In Re Will of Herring*, 198 S.E.2d 737, 739-40 (N.C. Ct. App. 1973).
NORTH DAKOTA	Immediate appeal	N.D. CENT. CODE § 28-27-02(4) (1991); *Grenz v. Kelsch*, 436 N.W.2d 552, 556-57 (N.D. 1989); *In re Estate of Stuckle*, 427 N.W.2d 96, 100 n.7 (N.D. 1988).
OHIO	Immediate appeal or appeal after retrial	OHIO REV. CODE ANN. § 2505.02 (Anderson 1991); *Price v. McCoy Sales & Serv., Inc.*, 207 N.E.2d 236, 239-42 (Ohio 1965).
OKLAHOMA	Immediate appeal or appeal after retrial	OKLA. STAT. ANN. tit. 12, § 952(b)(2) (West 1988); *Chemco Prods., Inc. v. Moley Produce Co.*, 615 P.2d 300, 300-01 (Okla. 1980).

STATE	METHOD OF REVIEW	AUTHORITY
OREGON	Immediate appeal	OR. REV. STAT. § 19.010(2)(d) (1988); *E.A. Mock & Sons, Inc. v. Mehdizadehkashi*, 755 P.2d 739, 740-41 (Or. Ct. App. 1988).
PENNSYLVANIA	Immediate appeal	PA. R. APP. P. 311(a)(5); *Hoban v. Conroy*, 32 A.2d 769, 770 (Pa. 1943); *Buck v. Scott Township*, 472 A.2d 691, 693 (Pa. Super. Ct. 1984).
RHODE ISLAND	Immediate appeal	*Cotrona v. Johnson & Wales College*, 501 A.2d 728, 731 (R.I. 1985); *Kelly v. C.H. Sprague & Sons Co.*, 455 A.2d 1302, 1304 (R.I. 1983); *Cartier v. State*, 420 A.2d 843, 847-48 (R.I. 1980).
SOUTH CAROLINA	Immediate appeal (limited circumstances)	S.C. CODE ANN. § 14-3-330 (Law. Co-op. 1977 & Supp. 1990); *South Carolina Dept. of Highways & Public Transp. v. Mooneyham*, 269 S.E.2d 329, 330 (S.C. 1980).
SOUTH DAKOTA	Immediate appeal	S.D. CODIFIED LAWS ANN. §15-26A-3(3), (1984 & Supp. 1991); *Wilge v. Cropp*, 54 N.W.2d 568, 568-69 (S.D. 1952).
TENNESSEE	Discretionary appeal or appeal after retrial	TENN. R. APP. P. 9, 10; *Panzer v. King*, 743 S.W.2d 612, 615-16 (Tenn. 1988).
UTAH	Discretionary appeal or appeal after retrial	UTAH CODE ANN. §§ 78-2-2(3)(i), 78-2a-3 (1987 & Supp. 1991); Utah R. App. P. 3, 5; *Haslam v. Paulsen*, 389 P.2d 736, 736-37 (Utah 1964).
VERMONT	Discretionary appeal	VT. R. APP. P. 5(b) *Grow v. Wolcott*, 194 A.2d 403, 404 (Vt. 1963).
VIRGINIA	No review	VA. CODE ANN. § 8.01-670 (Michie 1950); *Turner v. Burford Buick Corp.*, 112 S.E.2d 911, 912 (Va. 1960).
WASHINGTON	Immediate appeal	WASH. R. APP. P. 2.2(a)(9); *Lahmann v. Sisters of St. Francis*, 780 P.2d 868, 871 (Wash. Ct. App. 1989).
WEST VIRGINIA	Immediate appeal	W. VA. CODE § 58-5-1(i) (1966 & Supp. 1991); *Parsons v. McCoy*, 202 S.E.2d 632, 635 (W. Va. 1973).
WISCONSIN	Discretionary appeal	WIS. STAT. ANN. §§ 808.03(2), 809.50(1) (West Supp. 1991); *Wick v. Mueller*, 313 N.W.2d 799, 802 (Wis. 1982).
WYOMING	Immediate appeal	WYO. R. APP. P. 1.05(3); *McBride v. McBride*, 598 P.2d 814, 816 (Wyo. 1979).

Supreme Court, U.S.
FILED
DEC 18 1991
OFFICE OF THE CLERK

(3)

No. 91-830

IN THE

Supreme Court of The United States

OCTOBER TERM, 1991

AVALA OF TEXAS, INC., d/b/a THE AVALA GROUP
AND d/b/a PLYMOUTH PARK SHOPPING CENTER

AND

INTERSHOP REAL ESTATE SERVICES, INC.,
f/k/a HFA MANAGEMENT USA CO.,

Petitioners

V.

THE HONORABLE DAVID WEST
JUDGE OF THE 269TH DISTRICT COURT
HARRIS COUNTY, TEXAS

AND

THE HONORABLE COURT OF APPEALS-
FOR THE FIRST DISTRICT OF TEXAS,

Respondents

RESPONDENTS' BRIEF IN OPPOSITION

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Houston, Texas 77002
(713) 223-3330
Attorney Ad Litem For
Alicia Nicole Garcia

PERRY O. BARBER JR.
Counsel of Record

RONALD D. KRIST
KEVIN D. KRIST
DAVID A. SLAUGHTER
Krist, Gunn, Weller, Neumann
& Morrison, L.L.P.
17555 El Camino Real
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(713) 283-8500
Counsel for Respondents

QUESTION PRESENTED

Does the due process clause of the Fourteenth Amendment require that orders of Texas trial courts granting new trials be reviewable by writ of mandamus?

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No. 91-830

In The

Supreme Court of The United States

October Term, 1991

Avala of Texas, Inc., d/b/a The Avala Group
and d/b/a Plymouth Park Shopping Center

and

Intershop Real Estate Services, Inc.,
f/k/a HFA Management USA Co.,

Petitioners

v.

The Honorable David West
Judge of The 269th District Court
Harris County, Texas

and

The Honorable Court of Appeals
For The First District of Texas,

Respondents

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT

Respondents (Plaintiffs below and the real parties in interest herein) filed suit against Petitioners (the owner and manager of the Plymouth Park Shopping Center) to recover damages for the death of Patricia Wilson Garcia, who was murdered as she was attempting to buy stamps at a self-service postal island located in the parking lot of the center (Petition 3). After a jury trial resulted in a verdict favorable to Petitioners (App. G to Petition), the trial court entered judgment on the verdict in Petitioners'

favor (App. F to Petition). On Respondents' Motion (App. I to Petition), the trial court entered an order granting a new trial (App. D to Petition). Although the order specified no reason, the trial court indicated during the hearing on Petitioners' Motion for Reconsideration that the new trial was granted in the interest of justice (App. J to Petition at 3).

After unsuccessful attempts in the Court of Appeals (App. C to Petition) and the Supreme Court of Texas (App. A, B to Petition) to review the new trial order by way of mandamus, Petitioners sought certiorari in this Court.

REASONS FOR DENYING CERTIORARI

1. Petitioners failed to raise the equal protection claim now being asserted in this Court in the Texas courts. Petitioners' equal protection claim in the Texas Court of Appeals (App. K to Petition at 19) and in the Supreme Court of Texas (App. N to Petition at 20) was an assertion, unsupported by authority, that the "... exemption of new trial orders from any review contravenes the due process and equal protection clauses of the United States and Texas constitutions." The equal protection argument now being advanced (Petition 18-19) — that Texas, having recognized two exceptions to the reviewability of new trial orders by way of mandamus, must review all new trial orders by way of mandamus — was never presented to the Texas courts. Because Petitioners' equal protection claim is being presented for the first time in this Court, review is precluded. *Beck* v. *Washington*, 369 U.S. 541 (1962).[1]

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[1] Moreover, the claim lacks merit. It amounts to no more than a contention that because the writ issues in one case and is denied in another, the party who is unable to secure mandamus relief has been unconstitutionally discriminated against. *Compare* Mallard v. United States Dist. Court, 490 U.S. 296 (1989) *with* Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33 (1980).

2. The judgment of the Supreme Court of Texas rests on an adequate and independent state ground within the meaning of this Court's decision in *Herb* v. *Pitcairn,* 324 U.S. 117, 125-26 (1945). The Texas decisions make clear that mandamus will lie only to correct an abuse of discretion or a violation of clear duty *and* when there is no other adequate remedy at law.[2] Given the factually intensive nature of Petitioners' argument (App. N to Petition at 8-11), it is probable that the Supreme Court of Texas denied leave to file solely because under the Texas decisions mandamus was not available. It certainly cannot be said that the "necessary effect" of denial was to reject Petitioners' constitutional challenge, as Petitioners contend (Petition 9 n.6).[3]

3. Petitioners' narrow claim that the due process clause of the Fourteenth Amendment requires the Texas courts to review orders granting new trials by way of mandamus is a classic case of a "federal question" so absolutely devoid of merit as to be frivolous. *Cf. Equitable Life Assurance Society* v. *Brown,* 187 U.S. 308 (1902). Recognizing that it has no authority for this proposition and that the analogous controlling authority is to the contrary,[4] Petitioners have broadened their argument to one asserting that the Texas scheme is constitutionally defective because orders granting a new trial are effectively unreviewable (Petition 10-18). There are two problems with this approach.

First, Petitioners cite no case, and Respondents are aware of none, holding that the due process clause of the Fourteenth Amendment requires that the states provide appellate review of

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[2] *See, e.g.,* State v. Walker, 679 S.W.2d 484, 485 (Tex. 1984).

[3] The absence of any opinions from the Texas courts distinguishes this case from New York *ex rel.* Bryan v. Zimmerman, 278 U.S. 63 (1928).

[4] Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33 (1980) (mandamus not available to review action of a federal trial court granting a new trial).

orders granting new trials at some stage.[5] Second, this broader issue is not presented by the action of the Texas courts in denying mandamus. Should Petitioners wish to assert this broader contention, the proper time to do so is on appeal following the second trial.[6] Although that argument is not supported by the prior decisions,[7] at least the question would be properly before the Court.

4. The underlying merits of the case[8] turn solely on an analysis of the factual sufficiency of the evidence to support the verdict. As this Court has observed, it does ". . . not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

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[5] Although the *Daiflon* result is bottomed in part on the availability of review on appeal from the judgment following a second trial, the case by no means stands for the proposition that the Fifth Amendment guarantees a review at some stage of federal court orders granting new trials.

[6] The Petitioners' quarrel is with the decision in Cummins v. Paisan Const. Co., 682 S.W.2d 235, 236 (Tex. 1984) (order granting new trial not reviewable on appeal after second trial), not with the unavailability of mandamus.

[7] *Cf.* Martinez v. California, 444 U.S. 277, 282 (1980) (state interest in fashioning its own rules of substantive tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual from state action that is wholly arbitrary or irrational).

[8] *See* Question 3 (Petition ii) and Petitioners' requested relief (Petition 21).

CONCLUSION

For these reasons the Petition for Writ of Certiorari should be denied.

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No. 91-830

IN THE

Supreme Court of The United States

OCTOBER TERM, 1991

AVALA OF TEXAS, INC., d/b/a THE AVALA GROUP
AND d/b/a PLYMOUTH PARK SHOPPING CENTER
AND
INTERSHOP REAL ESTATE SERVICES, INC.,
f/k/a HFA MANAGEMENT USA CO.,
Petitioners

v.

THE HONORABLE DAVID WEST
JUDGE OF THE 269TH DISTRICT COURT
HARRIS COUNTY, TEXAS
AND
THE HONORABLE COURT OF APPEALS
FOR THE FIRST DISTRICT OF TEXAS,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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REPLY TO RESPONDENTS' REASONS FOR DENYING CERTIORARI[1]

Respondents' Brief in Opposition proposes four reasons for denying certiorari, each of which is meritless:

[1] Petitioners would like to bring to the Court's attention a development that has occurred since Petitioners filed their petition for certiorari on November 25, 1991. On page 9 of the

1. Respondents first contend that Petitioners[2] failed to raise their equal protection claims in the Texas state courts. That contention is wrong.

Petitioners are making the same constitutional challenges — including the same equal protection challenges — in this Court that they made in the Texas state courts. In their petition for certiorari, Petitioners complain that the Texas treatment of new trial orders violates the Equal Protection Clause because Texas courts will grant mandamus review of new trial orders that are void or based on a perceived conflict in jury answers, but will not review any other new trial orders no matter how blatantly erroneous they may be. (Pet. at 18-20). Petitioners further point out that the unavailability of mandamus review for new trial orders falling outside of the two exceptions is not only unequal compared with the reviewability of new trial orders falling within the two exceptions, but also compared with the widespread availability of mandamus review for other kinds of trial court orders in Texas. (Pet. 19-20 & n.40).

Petitioners raised the same complaints in the Texas state courts. In both the Texas Court of Appeals and the Texas Supreme Court, Petitioners expressly stated that they were challenging "the unjust and unconstitutional rule" shielding a trial judge's order granting a new trial from review "unless the order is wholly void or expressly based on a perceived conflict in jury answers." (App. at K-3, N-4; *see* Pet. at 6, 8). Petitioners then explained the historical genesis of the two exceptions and argued that restriction of mandamus review

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petition, Petitioners stated that a second trial in this matter was scheduled to begin on December 9, 1991. The trial date has now been continued until March 2, 1992.

[2] For a listing of Petitioners' parent companies and non-wholly owned subsidiaries pursuant to Supreme Court Rule 29.1, see Pet. at iv.

to those two exceptions should be rejected.[3] (App. at K-14 to K-18, N-15 to N-19; *see* Pet. at 12 n.25). Petitioners stressed that every other kind of trial court order is subject to some kind of review under the Texas system and argued that the peculiar treatment of new trial orders is unconstitutional. (App. at K-19, N-20). Petitioners specifically relied on the Equal Protection Clause as a basis for challenging the Texas rule of law in question. (App. at K-19, N-20).

In determining whether Petitioners' equal protection claim was adequately presented to the Texas courts, "[n]o particular form of words or phrases is essential" so long as the claim was brought to the state courts' attention with "fair precision." *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928). Thus, "if the record as a whole shows either expressly or by clear intendment" that Petitioners' equal protection claim was raised, then "the claim is to be regarded as having been adequately presented." *Id.* In arguing that Petitioners' equal protection claim "was never presented to the Texas courts," Respondents ignore the entirety of the record and instead quote a single sentence fragment out of context.[4] (Resp't Br. at 2). Because the

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[3] The frivolousness of Respondents' contention that Petitioners did not adequately complain of the peculiar treatment afforded the two exceptions is evident from the fact that Respondents themselves explicitly referred to the two exceptions in framing the "QUESTIONS PRESENTED" before the Texas state courts. (App. at L-2 to L-3 & n.2, O-2 to O-3 & n.2; *see* Pet. at 7, 8).

[4] Although Respondents assert that Petitioners' equal protection claim was "unsupported by authority" at the state court level (Resp't Br. at 2), Petitioners' claim was in fact supported by citations to the Fifth and Fourteenth Amendments of the Constitution. (App. at K-19, K-21, N-20, N-22). Moreover, this Court's "jurisdiction does not depend on citation to book and verse." *Eddings v. Oklahoma*, 455 U.S. 104, 113 n.9 (1982).

record as a whole shows that Petitioners' federal equal protection claim was raised in the Texas state courts, the claim was adequately presented.

Respondents' reliance on *Beck v. Washington*, 369 U.S. 541 (1962), for the proposition that Petitioners did not adequately present their equal protection complaint at the state court level is misplaced. In *Beck*, unlike the present case, the petitioner's constitutional attack at the state court level never identified the rule under attack, "much less argue[d] that a restrictive interpretation would be unconstitutional under the Equal Protection Clause." *Id.* at 550; *see* App. at K-19, K-21, N-20, N-22. *Beck* is also inapposite because, unlike this case, the petitioner's equal protection claim "was not within the scope of the questions to which the writ of certiorari . . . was specifically limited." 369 U.S. at 554; *see* Pet. at i.

Finally, contrary to Respondents' argument, Petitioners do not claim to have been "unconstitutionally discriminated against" merely because they were "unable to secure mandamus *relief*." (Resp't Br. at 2 n.1 (emphasis added)). Rather, Petitioners' equal protection claim is based on their inability even to secure mandamus *review* — although mandamus review of new trial orders is available in two arbitrarily determined situations. (Pet. at 18-20).

2. Respondents also contend that certiorari should be denied because the Texas Supreme Court's judgment rests on "an adequate and independent state ground within the meaning of this Court's decision in *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945)" (Resp't Br. at 3). Respondents' contention must be rejected for at least two reasons.

First, and most significantly, Respondents' analysis of the adequate and independent state grounds doctrine is fundamentally flawed. Under that doctrine, the Supreme Court can not review a state court's decision if the decision rests on

an adequate and independent state ground. In the present case, Respondents argue that "it is probable that the Supreme Court of Texas denied leave to file [the petition for writ of mandamus] because under the Texas decisions mandamus was not available." (Resp't Br. at 3). Since the unavailability of mandamus review was the very aspect of Texas law that Petitioners sought to challenge as violative of the federal constitution, the fact that Texas law does not provide mandamus review can hardly be classified as an adequate and independent state ground for the Texas Supreme Court's decision in this case. As one noted commentator has observed, "[s]tate procedural rulings cannot be found to be independent of a claim that the procedural rulings themselves cause a denial of due process." 16 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4025, at 727 (1977).

In the second place, this Court has expressly disapproved *Herb* and has superseded its approach. *See Michigan v. Long*, 463 U.S. 1032, 1038-39, 1042 & n.7 (1983). This Court's current approach is to *presume* that no adequate and independent state grounds exist [1] "when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground and [2] when it fairly appears that the state court rested its decision primarily on federal law." *Id.* at 1042. Respondents' argument fails to overcome this presumption. First, the Texas Supreme Court's judgment nowhere reveals that it rests on state grounds. (*See* Apps. A, B). Second, as Petitioners argued in their petition for certiorari, the necessary effect of the Texas Supreme Court's denial of leave to file the petition for mandamus was to reject Petitioners' federal constitutional challenges. (Pet. at 9 n.6). It should be noted that Respondents themselves urged the Texas Supreme Court to deny Petitioners' due process and equal protection challenges on the basis

of this Court's decisions of federal constitutional law. (*See* App. at O-6 to O-8).

3. Respondents' contention that the issue whether a litigant may obtain review of a new trial order by mandamus is "so absolutely devoid of merit as to be frivolous" (Resp't Br. at 3) is itself frivolous since this Court deemed a similar issue certworthy in *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33 (1980) (per curiam).

Daiflon did not, however, resolve the questions raised in this proceeding. Whereas *Daiflon* held that mandamus was not available to review a federal court's new trial order when the litigant had a remedy by appeal, 449 U.S. at 35-36, the present case involves a mandamus action to review a state court's new trial order when there is *no* remedy by appeal (Pet. at 12), and when the state has created mandamus review for new trial orders, but has arbitrarily limited such review to two circumstances (Pet. at 18-19). These distinctions, as well as others, raise important and unresolved questions of due process and equal protection deserving of this Court's plenary consideration. (*See* Pet. at 14-15).

Furthermore, the questions presented are properly before the Court at this time because in this proceeding Petitioners are challenging the unavailability of mandamus review (Pet. at i, 9-10) — not, as Respondents apparently would have the Court believe, the unavailability of appeal after retrial (Resp't Br. at 4 & n.6). While the unavailability of review after a second trial may affect this Court's analysis of the constitutionality of the Texas treatment of new trial orders, it certainly does not follow that Petitioners must undergo the hardship and expense of a second trial — which are part of the very harm that Petitioners seek to avoid — before they can challenge the constitutionality of the unavailability of mandamus review under the Texas system. The questions

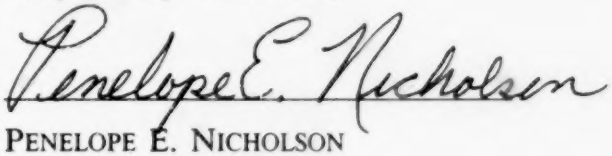
contained in the petition for certiorari are properly before the Court now.

4. Respondents' last reason for denying certiorari is that this Court should not grant certiorari in order to review evidence or resolve factual disputes. (Resp't Br. at 4 & n.8). Petitioners have never contended that certiorari should be granted for those reasons. Petitioners explicitly excluded Question 3 (which relates to whether the trial court abused its discretion in granting a new trial) from the reasons why this Court should grant certiorari and merely reserved the right to argue Question 3 in the event that certiorari is granted on Questions 1 and 2. (*See* Pet. at ii, 21).

CONCLUSION

For these reasons, as well as the reasons set forth in the petition for writ of certiorari, Petitioners respectfully request that the Court grant the petition for writ of certiorari and that the Court grant all relief requested in the petition for writ of certiorari.

Respectfully submitted,



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